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(The Supreme Court.)

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SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, P.B. GAJENDRAGADKAR AND K. N. WANCHOO, JJ.

Shiva Jute Baling Limited .. *Appellants**

v.

Hindley and Company Limited .. *Respondents.*

Arbitration Act (X of 1940), sections 35 and 33—Scope and effect—Arbitration proceedings pending legal proceedings—When valid—Contract Act (IX of 1872), sections 73 and 74—Scope.

Section 33 of the Arbitration Act contemplates an application for three purposes, namely, (i) when it is desired to challenge the existence of an arbitration agreement (ii) when it is desired to challenge its validity and (iii) when it is desired to have its effect determined. Where an arbitration agreement arises out of a term contained in a contract which deals with various other matters section 33 is concerned only with the term relating to arbitration and not with the other terms of the contract which do not arise for consideration on an application under that section. Section 35 makes proceedings before the arbitrators invalid in the absence of an order under section 34 staying the legal proceedings, where the whole of the subject-matter of the reference is covered by the legal proceedings which have been instituted. Prayers under section 33 relating to the existence and validity of the arbitration agreement not being matters within the competence of the arbitrators there can be no identity of the subject-matter under reference to arbitrators and the subject-matter of the prayers in the application under section 33. Section 35 in consequence can have no application and the award passed by the arbitrators cannot be assailed on the ground that it violates section 35.

Where the contract provides the measure of liquidated damages over and above the difference between the contract price and the market price on the date of default, it cannot be said that it was *per se* unreasonable and was therefore bad according to the law of India as laid down in sections 73 and 74 of the Contract Act. Section 74 of the Contract Act contemplates that the maximum reasonable compensation may be the amount which may be named in the contract.

Appeal from the Judgment and Decree, dated the 4th February, 1953, of the Calcutta High Court in Appeal from Original Decree No. 68 of 1952, arising out of the Judgment and Decree, dated the 14th January, 1952, of the said High Court in Special Suit No. 2 of 1951.

N. C. Chatterjee and *C. B. Agarwala*, Senior Advocates (*Sukumar Ghose*, Advocate, with them), for the Appellants.

B. Sen, Senior Advocate (*S. N. Mukherjee*, Advocate and *S. N. Andley*, *J. B. Dadachanji* and *Rameswar Nath*, Advocates of Messrs. Rajinder Narain & Co., with him) for the Respondents.

* Civil Appeal No. 262 of 1955. 21st August, 1959.

The Judgment of the Court was delivered by

Wanchoo, J.—This is an appeal by Special Leave against the judgment of the Calcutta High Court. The appellant is a company, incorporated in India, with its registered office in Calcutta dealing in jute. It entered into a contract on June 18, 1945, with the respondent-company, which is incorporated in England and has its registered office in London. The contract was for the supply of five hundred bales of jute of crop 1945-46 to be shipped from Calcutta or Chittagong to Rio de Janeiro, when freight became available. The contract provides that in the event of default of tender or delivery, the seller shall pay to the buyer as and for liquidated damages 10s. per ton plus the excess (if any) of the market value over the contract price, the market value being that of jute contracted for on the day following the date of default. This date was to be the date in London on declaration of default by telegram or without such declaration if default was eventually made by lapse of time on the 21st day after expiry of the extended period. There is also a provision for arbitration, which lays down that any claim or dispute whatever arising out of, or in relation to this contract or its construction or fulfilment shall be referred to arbitration in London in accordance with the bye-laws of the London Jute Association, and it was open to either party to claim arbitration whenever and as often as disputes arose. The contract also provides for an appeal by any party dissenting from an arbitration award to the London Jute Association in accordance with the regulations in force for the time being. Lastly, it is provided that the contract would be construed according to the laws of England whatever the residence and nationality of the parties might be or become and would be deemed to be performed there. The Courts of England or arbitrators, as the case might be, would have exclusive jurisdiction over all disputes which might arise under the contract, except for the purpose of enforcing in the Colonies or abroad any arbitration award made under this contract.

On June 23, 1947, thirty-nine bales of jute were consigned by the appellant to Rio de Janeiro in part performance of the contract and information of this was given to the respondent by letter on July 17, 1947. It was said in this letter that difficulty had arisen because of the non-availability of quota and it was hoped that the balance remaining under the contract would be shipped as soon as quota was available. The respondent sent a reply to this letter on July 25, 1947, and the appellant wrote a further letter on August 1, 1947, in which it was said that the remaining amount of jute under the contract would be shipped as soon as the quota was available.

We do not know what happened thereafter till we come to August, 1948. It seems that the respondent received a cable on August 12, 1948, from the appellant stating that the contract stood cancelled long ago. The respondent by its letter dated August 12, 1948, refused to accept this position. Thereafter there were disputes and differences between the parties and eventually the respondent claimed default on or about June, 1949, in terms of the contract. On or about July 14, 1949, the respondent referred the matter to the arbitration of the London Jute Association which appointed two of its members as arbitrators. The respondent filed its claim before the Arbitrators on July 23, 1949. On July 27, 1949, the Arbitrators gave notice to the appellant to file its answer by August 19, 1949. The appellant, however, filed no answer before the Artbitrators. What the appellant did in reply was to file an application under section 33 of the Indian Arbitration Act (X of 1940), (hereinafter called the Arbitration Act) on the Original Side of the Calcutta High Court, in which it made three prayers, namely—

(*a*) declaration that the arbitration agreement, if any, between the parties was void *ab initio* on the ground of uncertainty and was not binding on the appellant;

(*b*) declaration that there was in fact and in law no contract between the parties on account of mutual mistake of the parties; and

(*c*) that the Court might be pleased to adjudicate on the existence and/or validity of the alleged arbitration agreement and the effect of the same.

This application was moved on August 12, 1949. It appears that on August 13, 1949, the appellant sent a cable to the respondent and the London Jute Association informing them that an application had been made in the Calcutta High Court challenging the submissions contained in the contract and that the Arbitrators had become *functus officio* pending disposal of the application, which was fixed for August, 29. The appellant received a reply to its cable in which it was asserted that no such application as the appellant had made to the Calcutta High Court could be made there and that the Arbitrators would proceed with the adjudication on August 27 as already fixed. On August 17, 1949, the appellant sent a letter to the London Jute Association in which it referred to its cable and the reply of the Association to that and reiterated its stand that any further steps taken in the arbitration proceedings pending disposal of the application under section 33 would be invalid under the Arbitration Act. The Arbitrators, however, proceeded with the arbitration and gave their award on October 17, 1949.

No proceedings thereafter were taken by the appellant in London, nor does it appear that any steps were taken by it to have its application under section 33 decided, till we come to November 26, 1951. On that date, an application was filed by the respondent in the Calcutta High Court under section 5 of the Arbitration (Protocol and Convention) Act, 1937 (VI of 1937), (hereinafter called the Protocol Act). Along with this application it filed the award, dated October 17, 1949, and prayed that judgment be pronounced in accordance with the award and decree be passed accordingly. Notice of this was issued to the appellant, which filed its reply on January 14, 1952. We do not think it necessary to set out the petition of the respondent under section 5 of the Protocol Act and the appellant's reply thereto in detail, because when the matter came to be heard in Court only two points were urged on behalf of the appellant, namely—

(1) that the award was made after the notice of filing of the petition, dated 10th August, 1949, under section 33 of the Arbitration Act had been given to the respondent and the Arbitrators, and consequently award made after the receipt of the said notice and during the pendency of the said application was bad under section 35 of the Arbitration Act ; and

(2) that the award was bad on the face of it and could not therefore be enforced in view of the provisions of section 7 (*e*) of the Protocol Act, which lays down that an award cannot be enforced in India if it is contrary to the law of India. It was contended that the award was contrary to the law of India and this appeared on the face of it inasmuch as the Arbitrators had purported to award such damages as could not be done under the provisions of the Indian Contract Act (IX of 1872).

Both these contentions were negatived by the learned Single Judge and he ordered the award to be filed in Court and passed a decree in terms thereof.

The appellant then went up in appeal, which was heard by a Division Bench of the Calcutta High Court. The grounds of appeal show that the same two points, which were urged before the learned Single Judge, were reiterated therein. When the matter came to be heard before the Division Bench, the same two points were raised on behalf of the appellant there also. The Division Bench negatived the two contentions raised before it on behalf of the appellant and confirmed the judgment of the learned Single Judge. It is curious, however, to notice that though all these proceedings were being taken on the application under section 5 of the Protocol Act the appellant apparently took no steps to have its application under section 33 of the Arbitration Act, which seems to have been adjourned *sine die*, decided along with the respondent's application under section 5 of the Protocol Act.

This was followed by a application for a certificate to appeal to this Court, which was refused. Then the appellant applied to this Court for Special Leave to appeal, which was granted. In the Special Leave Petition also the appellant raised the same two points, namely, (i) the construction of sections 33 and 35 of the Arbitration Act and the application of these provisions to the facts of this case, and (ii) the construction of section 7 of the Protocol Act and the Indian Contract Act with respect to the damages awarded by the award.

In the statement of case also after narrating the facts and circumstances, the same two points were mentioned as the principal questions which arose for determination in the appeal, namely, (i) the effect of sections 33 and 35 of the Arbitration Act on the facts and circumstances of this case, and (ii) the interpretation of section 7 of the Protocol Act in the light of sections 73 and 74 of the Indian Contract Act and their bearing on the damages awarded by the Arbitrators and its effect on the validity of the award.

Learned counsel for the appellant, however, wanted to raise before us other points arising out of section 7 of the Protocol Act. We do not think that the appellant should be permitted to raise at this late stage any new point in addition to the two points which were urged before the learned Single Judge and which only have all along been raised in the appeal to the High Court and in the appeal before this Court. We shall therefore confine the appellant to these two points only and proceed on the assumption in the same manner as has been done by the High Court, namely, that an application under section 33 of the Arbitration Act would lie in the circumstances of this case and therefore the provisions of section 35 of the Arbitration Act would be attracted.

Re.—(1) The part of section 33 of the Arbitration Act, relevant for our purpose, lays down that any party to an arbitration agreement desiring to challenge the existence or validity of an arbitration agreement or to have its effect determined shall apply to the Court and the Court shall decide the question. It will thus be clear that section 33 contemplates an application for three purposes, namely, (i) when it is desired to challenge the existence of an arbitration agreement, (ii) when it is desired to challenge its validity, and (iii) when it is desired to have its effect determined. An arbitration agreement may come into existence in one of two ways ; it may either arise out of an agreement which contains nothing else besides arbitration agreement, or it may arise out of a term contained in a contract which deals with various other matters relating to the contract, which is the present case. Where one is dealing with an arbitration agreement of the second kind, section 33 is concerned only with the term relating to arbitration in the contract and not with the other terms of the contract which do not arise for consideration on an application under that section.

Then we come to section 35. It provides that no reference or award shall be rendered invalid by reason only of the commencement of legal proceedings upon the subject-matter of the reference, but when legal proceedings upon the whole of the subject-mattter of the reference has been commenced between all the parties to the reference and a notice thereof has been give to the Arbitrators or umpire, all further proceedings in a pending reference shall, unless a stay of proceedings is granted under section 34, be invalid. It will be seen, therefore, that section 35 makes proceedings before the Arbitrators invalid in the absence of an order under section 34 staying the legal proceedings, where the whole of the subject-matter of the reference is covered by any legal proceedings taken with respect to it. In other words, an Arbitrator can continue the proceedings and proceed to make the award on the reference, unless the whole of the subject-matter of the reference is covered by the legal proceedings which have been instituted. Assuming that the proceedings taken under section 33 are " legal proceedings ", mentioned in section 35, the question which immediately arises on the facts of the present case is whether the whole of the subject-matter of the reference in this case was covered by the legal proceedings taken by the appellant by its application under section 33 of the Arbitration Act.

In dealing with this aspect of the case, learned counsel for the appellant raised the question of frustration of the contract and the powers of the Court and the Arbitrator in that behalf. It is true that the words " frustration of contract" have been used in paragraph 8 of the application. But the prayers do not show that any relief was claimed on that ground, relief (*c*) being merely a repetition of the words of section 33 of the Arbitration Act. Learned counsel relied on *Heymen* v. *Darwins Ltd.*[1]

1. L.R. (1942) A.C. 356.

in this connection. We do not think we should permit the appellant to raise this contention at this late stage and would content ourselves by pointing out incidentally that even if the dictum in *Heymen's case*[1], is accepted, it will not help the appellant for on that dictum the question of frustration would be for the Arbitrators to decide on the basis of the terms used in this contract which are of the widest amplitude and would not be a matter for consideration of the Court. On this basis there would be no identity of subject-matter between what can be raised in an application under section 33 on the facts of this case and what can be decided by the Arbitrators. However, we do not propose to pursue this matter any further and to decide it.

Then we turn to prayers (*a*) and (*b*) of paragraph 9 of the application based on paragraphs 6 and 7 thereof. These prayers undoubtedly cannot be the subject-matter of arbitration, for they go to the very root of the contract and imply that there was no contract between the parties at all and therefore no arbitration agreement. These prayers can certainly form the basis of an application under section 33, for they relate to the existence and validity of the arbitration agreement contained in the contract ; but not being matters within the competence of the Arbitrators, there can be no identity of the subject-matter under reference to the Arbitrators and the subject-matter of prayers (*a*) and (*b*). The conclusion, therefore, is that prayers (*a*) and (*b*) can be the subject-matter of an application under section 33 but they cannot be the sub-ject-matter of the reference to the Arbitrators. Therefore, the subject-matter of the legal proceedings under section 33 in this case cannot and does not cover any part of the subject-matter of the reference. Section 35 in consequence can have no application and the award cannot be assailed as invalid on the ground that it violates section 35 of the Arbitration Act. The first contention, therefore, must fail.

Re. (2)—

The argument under this head is that the liquidated damages provided under clause (12) of the contract include not only the difference between the contract price and the market price on the date of default but also a further sum of 10 s. per ton. Reference in this connection is made to sections 73 and 74 of the Indian Contract Act, 1872 (IX of 1872) and it is said that the extra amount of 10 s. per ton included in the sum of liquidated damages is against the provision of these sections and therefore the award being against the law of India is bad on the face of its and should not be enforced in India. Section 73 provides for compensation for loss or damage caused by breach of contract. It lays down that when a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Section 74 provides for breach of contract where penalty is stipulated for or a sum is named and lays down that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. What clause (12) of the contract provides in this case is the measure of liquidated damages and that consists of two things, namely, (i) the difference between the contract price and the market price on the date of default, and (ii) an addition of 10 s. per ton above that. There is nothing in section 73 or section 74 of the Contract Act, which makes the award of such liquidated damages illegal. Assuming that the case is covered by section 74, it is provided therein that reasonable compensation may be awarded for breach of contract subject to the maximum amount named in the contract. What the Arbitrators have done is to award the maximum amount named in the contract. If the appellant wanted to challenge the reasonableness of that provision in clause (12) it should

1. L.R. (1942) A.C. 356.

have appeared before the Arbitrators and represented its case. It cannot now be heard to say that simply because clause (12) provided for a further sum of 10 s. per ton over and above the difference between the contract price and the market price on the date of the default, this was *per se* unreasonable and was therefore bad according to the law of India as laid down in sections 73 and 74 of the Contract Act. Both these sections provide for reasonable compensation and section 74 contemplates that the maximum reasonable compensation may be the amount which may be named in the contract. In this case the arbitrators have awarded the maximum amount so named and nothing more. Their award in the circumstances cannot be said to be bad on the face of it, nor can it be said to be against the law of India as contained in these sections of the Contract Act. The second contention must also fail.

We, therefore, dismiss the appeal with costs to the respondent.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, A. K. SARKAR AND K. SUBBA RAO, JJ.

British India General Insurance Co., Ltd. .. *Appellants**

v.

Captain Itbar Singh and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), section 96 (2) and (6)—Insurers subsequently added as defendants to action against owners of cars (who had insured against third party risks) for damages caused by negligent driving of cars—If can take grounds of defence other than those specified in sub-section (2):

Apart from statute an insurer of the owner of a car against third party risks has no right to be made a party to an action for damages by an injured person against the insured causing the injury. Sub-section (2) of section 96 of the Motor Vehicles Act, however, gives him the right to be made a party to the suit and defend it. The right, therefore, is created by statute and the content necessarily depends on the provisions of the statute. On the language of sub-section (2) an insurer to whom the requisite notice of the action has been given " shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely," after which comes an enumeration of the grounds. It would follow that an insurer is entitled to defend on any of the grounds enumerated and no others. Sub-section (6) of the section clearly contemplates that he cannot take any defence not mentioned in sub-section (2).

Appeals from the Order, dated the 27th April, 1955, of the Punjab High Court, in Civil Revisions Nos. 81-D of 1953 and 96-D of 1953 respectively.

C. K. Daphtary, Solicitor-General of India (*Rambehari Lal, D.K. Kapur* and *Sardar Bahadur*, Advocates, with him), for Appellants.

Dipak Datta Chaudhuri and *T. P. S. Chawla*, Advocates, for Respondent No. 1 in C.A. No. 413 of 1958.

Anup Singh, Advocate, for Respondents Nos. 1 to 3 in C.A. No. 414 of 1958.

G. C. Mathur, Advocate, for Respondent No. 5 in C.A. No. 414 of 1958.

The Judgment of the Court was delivered by

Sarkar, J.—These two appeals arise out of two suits and have been heard together. The suits had been filed against owners of motor cars for recovery of damages suffered by the plaintiffs as a result of the negligent driving of the cars. The owners of the cars were insured against third party risks and the insurers were subsequently added as defendants to the suits under the provisions of sub-section (2) of section 96 of the Motor Vehicles Act, 1939. The terms of that sub-section will have to be set out later, but it may now be stated that it provided that an insurer added as a party to an action under it was entitled to defend on the grounds enumerated in it.

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* Civil Appeals Nos. 413 and 414 of 1958. 11th May, 1959.

On being added as defendants, the insurers filed written statements taking defences other than those mentioned in that sub-section. The plaintiffs contended that the written statements should be taken off the records as the insurers could defend the action only on the grounds mentioned in the sub-section and on no others. A question thereupon arose in the suits as to what defences were available to the insurers. In one of the suits it was held that the insurers could take only the defences specified in that sub-section and in the other suit the view taken was that the insurers were not confined to those defences. Appeals were preferred from these decisions to the High Court of Punjab. The High Court held that the insurers could defend the actions only on the grounds mentioned in the sub-section and on no others. Hence these appeals by the insurers.

The question is whether the defences available to an insurer added as a party under section 96 (2) are only those mentioned there. A few of the provisions of the Motor Vehicles Act have now to be referred to. Section 94 of the Act makes insurance against third party risk compulsory. Section 95 deals with the requirements of the policies of such insurance and the limits of the liability to be covered thereby. Sub-section (1) of this section provides :

"........a policy of insurance must be a policy which—

(*a*) ....

....

(*b*) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him or them in respect of the death or bodily injury to any person caused by or arising out of the use of the vehicle in a public place."

Sub-section (2) of section 95 specifies the limits of the liability for which insurance has to be effected, and it is enough to say that it provides that in respect of private cars, which the vehicles with which these appeals are concerned were, the insurance has to be for the entire amount of the liability incurred. Then comes section 96 round which the arguments advanced in this case have turned and some of its provisions have to be set out.

"*Section* 96. (1) If, after a certificate of insurance has been issued under sub-section (4) of section 95 in favour of the person by whom a policy has been effected ; judgment in respect of any such liability as is required to be covered by a policy under clause (*b*) of sub-section (1) of section 95 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding, *e.g.*, that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment unless before or after the commencement of the proceedings in which the judgment is given the insurer had notice through the Court of the bringing of the proceedings, or in respect of any judgment so long as execution is stayed thereon pending an appeal ; and an insurer to whom notice of the bringing of any such proceeding is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely :—

(*a*) that the policy was cancelled by mutual consent or by virtue of any provision contained therein before the accident giving rise to the liability, and that either the certificate of insurance was surrendered to the insurer or that the person to whom the certificate was issued has made an affidavit stating that the certificate has been lost or destroyed, or that either before or not later than fourteen days after the happening of the accident the insurer has commenced proceedings for cancellation of the certificate after compliance with the provisions of section 105 ; or

(*b*) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely :—

(i) a condition excluding the use of the vehicle—

(*a*) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(*b*) for organised racing and speed testing, or

(*c*) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a public service vehicle or a goods vehicle, or

(*d*) without side-car being attached, where the vehicles is a motor cycle ; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification ; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion ; or

(*c*) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

(2-A) ....
....

(3) Where a certificate of insurance has been issued under sub-section (4) of section 95 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any conditions other than those in clause (*b*) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (*b*) of sub-section (1) of section 95, be of no effect :

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(4) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

(5) ....
....

(6) No insurer to whom the notice referred to in sub-section (2) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment as is referred to in sub-section (1) otherwise than in the manner provided for in sub-section (2)."

It may be stated that the policies that were effected in these cases were in terms of the Act and the certificate of insurance mentioned in section 96 had been duly issued. It will have been noticed that sub-section (1) of section 96 makes an insurer liable on the judgment obtained by the injured person against the assured. Sub-section (2) provides that no sum shall be payable by the insurer under sub-section (1) unless he has been given notice of the proceedings resulting in that judgment, and that an insurer who has been given such a notice shall be entitled to be made a party to the action and to defend it on the grounds enumerated. The contention of the appellants is that when an insurer becomes a party to an action under sub-section (2), he is entitled to defend it on all grounds available at law including the grounds on which the assured himself could have relied for his defence and that the only restriction on the insurers right of defence is that he cannot rely on the conditions of the policy which sub-section (3) makes as of no effect. This is the contention which we have to examine in these appeals.

To start with it is necessary to remember that apart from the statute an insurer has no right to be made a party to the action by the injured person against the insured causing the injury. Sub-section (2) of section 96 however gives him the right to be made a party to the suit and to defend it. The right therefore is created by statute and its content necessarily depends on the provisions of the statute. The question then really is, what are the defences that sub-section (2) makes available to an insurer ? That clearly is a question of interpretation of the sub-section.

Now the language of sub-section (2) seems to us to be perfectly plain and to admit of no doubt or confusion. It is that an insurer to whom the requisite notice of the action has been given " shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely " after which comes an enumeration of the grounds. It would follow that an insurer is entitled to defend on any of the grounds enumerated and no others. If it were not so, then of course no grounds need have been enumerated. When the grounds of defence have been specified, they cannot be added to. To do that would be adding words to the statute.

Sub-section (6) also indicates clearly how sub-section (2) should be read. It says that no insurer to whom the notice of the action has been given shall be entitled to avoid his liability under sub-section (1) " otherwise than in the manner provided for in sub-section (2) ". Now the only manner of avoiding liability provided for in sub-section (2) is by successfully raising any of the defences therein mentioned. It comes then to this that the insurer cannot avoid his liability except by establishing such defences. Therefore sub-section (6) clearly contemplates that he cannot take any defence not mentioned in sub-section (2). If he could, then he would have been in a position to avoid his liability in a manner other than that provided for in sub-section (2). That is prohibited by sub-section (6).

We therefore think that sub-section (2) clearly provides that an insurer made a defendant to the action is not entitled to take any defence which is not specified in it.

Three reported decisions were cited at the bar and all of them proceeded on the basis that an insurer had no right to defend the action except on the grounds mentioned in sub-section (2). These are *Sarup Singh* v. *Nilkant Bhaskar*[1], *Royal Insurance Co. Ltd.* v. *Abdul Mahomed*[2], and *The Proprietor, Andhra Trading Co.* v. *K. Muthuswamy*[3]. It does not appear however to have been seriously contended in any of these cases that the insurer could defend the action on a ground other than one of those mentioned in sub-section (2).

The learned counsel for the respondents, the plaintiffs in the action, referred us to the analogous English statute, The Road Traffic Act, 1934, in support of the view that the insurer is restricted in his defence to the grounds set out in sub-section (2). But we do not think it necessary to refer to the English statute for guidance in the interpretation of the section that we have to construe.

We proceed now to consider the arguments advanced by the learned Solicitor-General who appeared for the appellants. He contended that there was nothing in sub-section (2) to restrict the defence of an insurer to the grounds therein enumerated. To support his contention, he first referred to sub-section (3) of section 96 and said that it indicated that the defences that were being dealt with in sub-section (2) were only those based on the conditions of the policy. His point was that sub-section (2) permitted defences on some of those conditions and sub-section (3) made the rest of the conditions of no effect thereby preventing a defence being based on any of them. He said that these two sub-sections read together show that sub-section (2) was not intended to deal with any defence, other than those arising out of the conditions of the policy, and as to other defences therefore sub-section (2) contained no prohibition. He further said that as under sub-section (2) an insurer was entitled to be made a defendant to the action it followed that he had the right to take all legal defences excepting those expressly prohibited.

We think that this contention is without foundation. Sub-section (2) in fact deals with defences other than those based on the conditions of a policy. Thus clause (*a*) of that sub-section permits an insurer to defend an action on the ground that the policy has been duly cancelled provided the conditions set out in that clause have been satisfied. Clause (*c*) gives him the right to defend the action on the ground that the policy is void as having been obtained by non-disclosure of a material fact or a material false representation of fact. Therefore it cannot be said that in enacting sub-section (2) the Legislature was contemplating only those defences which were based on the conditions of the policy.

It also seems to us that even if sub-section (2) and sub-section (3) were confined only to defences based on the conditions of the policy that would not have led to the conclusion that the Legislature thought that other defences not based on such conditions, would be open to an insurer. If that was what the Legislature intended, then

1. I.L.R. (1953) Bom. 296.
2. I.L.R. (1954) Bom. 1422.
3. (1956) 1 M.L.J. 477 : I.L.R. (1957) Mad. 306 : A.I.R. 1956 Mad. 464.

there was nothing to prevent it from expressing its intention. What the Legislature has done is to enumerate in sub-section (2) the defences available to an insurer and to provide by sub-section (6) that he cannot avoid his liability excepting by means of such defences. In order that sub-section (2) may be interpreted in the way the learned Solicitor-General suggests we have to add words to it. The learned Solicitor-General concedes this and says that the only word that has to be added is the word " also " after the word " grounds ". But even this the rules of interpretation do not permit us to do unless the section as it stands is meaningless or of doubtful meaning, neither of which we think it is. The addition suggested will, in our view, make the language used unhappy and further effect a complete change in the meaning of the words used in the sub-section.

As to sub-section (6) the learned Solicitor-General contended that the proper reading of it was that an insurer could not avoid his liability except by way of a defence upon being made a party to the action under sub-section (2). He contended that the word ' manner ' in sub-section (6) did not refer to the defences specified in sub-section (2) but only meant, by way of defending the suit the right to do which is given by sub-section (2). We think that this is a very forced construction of sub-section (6) and we are unable to adopt it. The only manner of avoiding liability provided for in sub-section (2) is through the defences therein mentioned. Therefore when sub-section (6) talks of avoiding liability in the manner provided in sub-section (2), it necessarily refers to these defences. If the contention of the learned Solicitor-General was right, sub-section (6) would have provided that the insurer would not be entitled to avoid his liability except by defending the action on being made a party thereto.

There is another ground on which the learned Solicitor-General supported the contention that all defences are open to an insurer excepting those taken away by sub-section (3). He said that before the Act came into force, an injured person had no right of recourse to the insurer and that it was section 96 (1) that made the judgment obtained by the injured person against the assured binding on the insurer and gave him a right against the insurer. He then said that that being so, it is only fair that a person sought to be made bound by a judgment should be entitled to resist his liability under it by all defences which he can in law advance against the passing of it.

Again, we find the contention wholly unacceptable. The statute has no doubt created a liability in the insurer to the injured person but the statute has also expressly confined the right to avoid that liability to certain grounds specified in it. It is not for us to add to those grounds and therefore to the statute for reasons of hardship. We are furthermore not convinced that the statute causes any hardship. First, the insurer has the right, provided he has reserved it by the policy, to defend the action in the name of the assured and if he does so, all defences open to the assured can then be urged by him and there is no other defence that he claims to be entitled to urge. He can thus avoid all hardship if any, by providing for a right to defend the action in the name of the assured and this he has full liberty to do. Secondly, if he has been made to pay something which on the contract of the policy he was not bound to pay, he can under the proviso to sub-section (3) and under sub-section (4) recover it from the assured. It was said that the assured might be a man of straw and the insurer might not be able to recover anything from him. But the answer to that is that it is the insurer's bad luck. In such circumstances the injured person also would not have been able to recover the damages suffered by him from the assured, the person causing the injuries. The loss had to fall on some one and the statute has thought fit that it shall be borne by the insurer. That also seems to us to be equitable for the loss falls on the insurer in the course of his carrying on his business, a business out of which he makes profit, and he could so arrange his business that in the net result he would never suffer a loss. On the other hand, if the loss fell on the injured person, it would be due to no fault of his; it would have been a loss suffered by him arising out of an incident in the happening of which he had no hand at all.

We therefore feel that the plain words of sub-section (2) should prevail and that no ground exists to lead us to adopt the extraordinary course of adding anything to it. We think that the High Court was right in the view that it took.

In the result these appeals are dismissed with costs.

Appeals dismissed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. J. IMAM AND J. L. KAPUR, JJ.

Abdul Rahim Ismail C. Rahimtoola .. *Appellant**

v.

The State of Bombay .. *Respondent.*

Passport Act (XXXIV of 1920), *section* 3 *and Passport Rules* (1950), *Rules* 3 *and* 4—*Applicability—If restricted to non-Indian citizens—Constitutional validity—Constitution of India* (1950), *Article* 19 (1) (*d*) *and* (*e*) *and* (5).

Constitution of India (1950), *Article* 145 (3) *and* 143—*Substantial question of law—Question already decided by a bench of five Judges—If to be heard only by five Judges.*

Rules 3 and 4 of the Passport Rules, 1950 and section 3 of the Passport Act are *intra vires* and apply to all persons non-Indian citizens as well as Indian citizens. To require an Indian citizen to produce a passport before he can be allowed to enter India may be regarded as a proper restriction upon entering India.

Ebrahim Vazir Mavat v. *The State of Bombay,* 1954 S.C.R. 933, followed.

Accordingly entry into India without a passport by even an Indian citizen is in contravention of Rule 3 of the Passport Rules, 1950 and therefore punishable under rule 6 (*a*).

Where the very question raised has been decided by a Bench of the Supreme Court consisting of five Judges it cannot be said that a substantial question of law as to the interpretation of the Constitution arises in the case requiring it to be decided by a Constitution Bench of five Judges under Articles 143 and 145 (3), of the Constitution.

Appeal from the Judgment and Order, dated the 4th July, 1957, of the Bombay High Court in Criminal Application for Revision No. 278 of 1956, arising out of the Judgment and Order, dated the 3rd January, 1956, of the Presidency Magistrate, 16th Court, Esplanade, Bombay, in Criminal Case No. 1913/P of 1955.

O. N. Srivatsava, Advocate and *J. B. Dadachanji,* Advocate of *Messrs. Rajinder Narain & Co.,* for Appellant.

G. C. Mathur and *R. H. Dhebar,* Advocates, for Respondent.

The Judgment of the Court was delivered by

Imam, J.—The appellant was convicted under rule 6 (*a*) of the Indian Passport Rules, 1950, hereinafter referred to as the Rules, made under section 3 of the Indian Passport Act (XXXIV of 1920) hereinafter referred to as the Act, and was sentenced to pay a fine of Rs. 100. The High Court in exercising its revisional jurisdiction upheld the conviction but reduced the sentence to a fine of Rs. 25. It granted a certificate to the appellant that the case was a fit one for appeal to this Court.

It is beyond dispute now that the appellant is a citizen of India. Admittedly he entered the territories of India without a passport. The sole question for determination is whether his act in so entering the territories of India amounted to an offence punishable under Rule 6 (*a*) of the Rules.

The Act was passed in 1920 and has been the subject of amendment and modification thereafter. Its Preamble states " whereas it is expedient to take power to require passports of persons entering India, it is hereby enacted as follows." " Passport " has been defined as a passport for the time being in force issued or renewed by the prescribed authority and satisfying the conditions prescribed relating to the class of passports to which it belongs. Section 3 states :

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* Crl. A. No. 182 of 1957. 14th May, 1959.

"(1) The Central Government may make rules requiring that persons entering India shall be in possession of passports, and for all matters ancillary or incidental to that purpose.

(2) Without prejudice to the generality of the foregoing power such rules may—

(a) prohibit the entry into India or any part thereof of any person who has not in his possession a passport issued to him ;

(b) prescribe the authorities by whom passports must have been issued or renewed, and the conditions with which they must comply, for the purposes of this Act ; and

(c) provide for the exemption, either absolutely or on any condition, of any person or class of persons from any provision of such rules.

(3) Rules made under this section may provide that any contravention thereof or of any order, issued under the authority of any such rule shall be punishable with imprisonment for a term which may extend to three months, or with fine or with both.

(4) All rules made under this section shall be published in the Official Gazette, and shall thereupon have effect as if enacted in this Act."

Rule 3 of the Rules states :

" Save as provided in rule 4, no person, proceeding from any place outside India, shall enter, or attempt to enter, India by water, land or air unless he is in possession of a valid passport conforming to the conditions prescribed in rule 5."

Rule 4 specifies the persons who shall be exempted from the provisions of rule 3. Clause (b) or rule 4 exempts members of the Naval, Military or Air Forces of India on duty, and members of the family of any such person when accompanying such person to India on a Government transport. Clause (c) exempts persons domiciled in India proceeding from any of the French Establishments in India (other than Pondicherry and Karaikal) or from any of the Portuguese Establishments in India or Pakistan. Clause (f) exempts persons domiciled in India entering India by land or by air over the Nepalese or Tibetan frontier. Clause (h) exempts *bona fide* Mahomedan pilgrims returning from Jeddah or Basra and clause (i) exempts other persons or classes of persons specified by general or special orders of the Central Government.

The date of the appellant's entry into India is not known. He was certainly arrested on February 26, 1955, and it is his case that he entered India sometime after the decision of this Court in the case of *Ebrahim Vazir Mavat* v. *The State of Bombay*[1]. The judgment of this Court in that case was delivered on February 15, 1954. On that basis the appellant entered India sometime after February 15, 1954, and before February 26, 1955. It is unnecessary to specify in great detail the movements of the appellant between November 19, 1948, when he went to Karachi for the first time, and his arrest on February 26, 1955, as his movements during this period are not relevant in determining whether the appellant has committed an offence punishable under rule 6 (a) of the Rules. The case must be decided on the footing that sometime before his arrest on February 26, 1955, the appellant entered India without a passport.

Two contentions were raised on behalf of the appellant (1) that rule 3 of the Rules and section 3 of the Act were *ultra vires* the Constitution in so far as they purported to affect the right of an Indian citizen to enter India without a passport and (2) that on a proper interpretation of the provisions of section 3 of the Act and rule 3 of the Rules, these provisions did not apply to an Indian citizen. They applied only to non-Indian citizens.

As to the first contention it was urged that section 3 of the Act and rule 3 of the Rules in so far as they purported to relate to an Indian citizen were *ultra vires* the Constitution, as they offended against the provisions of Article 19 (1) (d) and (e). Article 19 (1) (d) confers the fundamental right on all Indian citizens " to move freely throughout the territory of India" and Article 19 (1) (e) "to reside and settle in any part of the territory of India ". This fundamental right, however, is subject to reasonable restrictions under clause (5) of Article 19. In the case of *Ebrahim*

1. 1954 S.C.R. 933.

Vazir Mavat v. *The State of Bombay*[1], the majority judgment of this Court held that an Indian citizen visiting Pakistan for any purpose whatsoever and returning to India may be required to produce a permit or a passport as the case may be before he can be allowed to enter India, and this requirement may well be regarded as a proper restriction upon entry. This Court, however, held that it was quite a different matter to say that if he enters India without a permit he may on conviction for such offence be ordered to be removed from India. It was the order directing his removal from India which was held by this Court to be tantamount to taking away his fundamental right guaranteed under Article 19 (1) (*e*) "to reside and settle in any part of the territory of India ". It is clear, therefore, that so far as this Court is concerned it has already decided that to require an Indian citizen to produce a passport before he can be allowed to enter India may be regarded as a proper restriction upon entering India. This decision is binding on us and we must follow the decision of this Court in the case referred to. It was, however, urged that as a constitutional question has been raised this matter cannot be decided by Judges less than five in number. Therefore, the case should be referred to what is described as the Constitution Bench. Article 145 (3) of the Constitution states that the minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of the Constitution or for the purpose of hearing any reference under Article 143 shall be five. It is clear that no substantial question of law as to the interpretation of the Constitution arises in the present case as the very question raised has been decided by a Bench of this Court consisting of five Judges. As the question raised before us has been already decided by this Court it cannot be be said that any substantial question of law arises regarding the interpretation of the Constitution.

As to the second submission made we have no hesitation is saying that the words used in section 3 of the Act and rules 3 and 4 of the Rules make it quite clear that they apply to every person including an Indian citizen. Under section 3 (1) of the Act the word " persons " has been stated without any qualification. Under section 3 (2) (*a*) the words employed are " any person " and in rule 3 the words employed are " no person ". Clause (*b*) of rule 4 obviously applies to Indian citizens but those mentioned in that clause have been specifically exempted from the operation of rule 3. Clause (*h*) of rule 4 (1) can apply to Indian citizens who are by religion Mahomedan. They have been exempted. Therefore, on a reasonable interpretation of section 3 of the Act and rules 3 and 4 of the Rules there can be no manner of doubt that these provisions apply to all persons including Indian citizens.

In our opinion, there can be no manner of doubt that the appellant's entry into India without a passport was in contravention of rule 3 of the Rules and therefore punishable under rule 6 (*a*) and the appellant was rightly convicted. The appeal is accordingly dismissed.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, P. B. GAJENDRAGADKAR AND K. SUBBA RAO, JJ.

Gullapalli Nageswararao and others .. *Appellants**

v.

The State of Andhra Pradesh and others .. *Respondents.*

Road Transport Corporations Act (LXIV of 1950)*—Bus transport undertaking taken over by Corporation—Objections of private bus operators—Competency of Chief Minister to hear and decide—Natural justice.*

Motor Vehicles Act (IV of 1939)*, section* 68-*F* (2) *and Andhra Pradesh Motor Vehicles Rules, Rule* 11*—Construction and effect.*

There is a clear distinction between the position of a Secretary of the Department (Transport in the instant case) and the Chief Minister of the State. The former is a part of the department and the

1. 1954 S.C.R. 933.

* C.As. Nos. 198 to 200 of 1959. 21st August, 1959.

latter is only primarily responsible for the disposal of the business of the department. The Chief Minister cannot be said to be part of the department constituted as a statutory State Transport Undertaking under the Road Transport Corporation Act (1950). The Chief Minister accordingly is not disqualified from deciding a dispute between the department and private bus operators.

The entire scehme of the Act visualizes, in case of conflict between the undertaking and the operators of private buses, that the State Government should sit in judgment and resolve the conflict.

A combined reading of section 68-F (2) of the Motor Vehicles Act and rule 11 of the Andhra Pradesh Motor Vehicles Rules makes it clear that the order contemplated under the said sub-section can be made by the Regional Transport Authority only after giving due notice to the persons likely to be affected by the said order. It is not sufficient compliance to issue the order and communicate it on the same day.

Appeals from the Judgment and Order, dated the 5th March, 1959, of the Andhra Pradesh High Court in Writ Petitions Nos. 1511 and 1512 of 1958 and 23 of 1959.

N. C. Chatterjee, Senior Advocate (*G. Suryanarayana*, *K. Mangachari* and *T. V. R. Tatachari*, Advocates, with him), for Appellants.

D. Narasaraju, Advocate-General for the State of Andhra Pradesh (*D. Venkatappiah Sastry* and *T. M. Sen*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Subba Rao, J.—These appeals on certificates are directed against the judgment of the High Court of Judicature, Andhra Pradesh at Hyderabad, dismissing the petitions filed by the appellants under Article 226 of the Constitution for issuing writs of *certiorari* to quash the orders of the Government of Andhra Pradesh confirming a scheme of nationalisation of transport and the subsequent orders of the Regional Transport Authority cancelling the appellant's stage carriage permits.

These appeals are the offshoot of the judgment of this Court in *Gullapalli Nageswara Rao* v. *Andhra Pradesh State Road Transport Corporation*[1], delivered on November 5, 1958. The facts were fully stated therein. It would be only necessary to recapitulate briefly the facts relevant to the present enquiry: The appellants were carrying on motor transport business for several years in Krishna District in the State of Andhra Pradesh. Shri Guru Pershad, styled as the General Manager of the State Transport Undertaking of the Andhra Pradesh Road Transport, published a scheme for nationalisation of motor transport in the said State from the date to be notified by the State Government. Objections to the said proposed scheme were invited by the State Government and the appellants, among others, filed their objections. On December 26, 1957, the Secretary in charge of the Transport Department gave a personal hearing to the objectors and heard the representations made on behalf of the State Transport Undertaking. The entire material gathered by him was placed before the Chief Minister of the State in charge of transport, who made the order approving the scheme. The approved scheme was published in the *Andhra Pradesh Gazette*, dated January 9, 1958, and it was directed to come into force with effect from January 10, 1958. Thereafter the Andhra Pradesh Road Transport Corporation, which was formed under the provisions of the Road Transport Corporation Act, 1950, took over the Undertaking and proceeded to implement the scheme under a phased programme. The appellants moved this Court under Article 32 of the Constitution for quashing the said scheme on various grounds. This Court rejected most of the objections raised by the appellants except in regard to two pertaining to the hearing given by the Secretary in charge of the Transport Department which resulted in the quashing of the order of the Government approving the scheme and directing it to forbear from taking over any of the routes on which the appellants were engaged in transport business. After the said order, notices were issued by the Government to all the objectors informing them that a personal hearing would be given by the Chief Minister on December 9, 1958, and they were further informed that they were at liberty to file further objections before November 30, 1958. The Chief Minister heard the representatives of the objectors

1. (1959) 2 M.L.J. (S.C.) 156 : (1959) 2 An. W.R. (S.C.) 156 : (1959) S.C.J. 967 : A.I.R. 1959 S.C. 308.

and the Corporation and passed orders dated December 19, 1958, rejecting the objections filed and approving the scheme as originally published. The order approving the scheme was duly published by the Government in the official Gazette on December 22, 1958. On December 23, 1958, the Corporation applied to the Road Transport Authority for the issue of permits for plying stage carriages and for eliminating the permits granted to the private bus operators. On December 24, 1958, the said Authority passed orders rendering the permits of the appellants ineffective from December 24, 1958, and also issuing permits to the Corporation in respect of the routes previously operated by the appellants. The said orders were communicated to the appellants on December 24, 1958, and they were also directed to stop plying their buses from December 25, 1958, on their respective routes. The appellants, who were aggrieved by the orders of the Government as well as by the order of the Regional Transport Authority filed petitions in the High Court under Article 226 of the Constitution for quashing the same.

The petitions were heard by a Division Bench of the said High Court consisting of Chandra Reddy, C.J., and Srinivasachari, J., who negatived the contentions raised by the appellants and dismissed the petitions. Hence these appeals.

The arguments of Mr. Chatterjee, learned counsel for the appellants, may be summarized thus : (1) This Court held in *Gullapalli Nageswara Rao* v. *Andhra Pradesh State Road Transport Corporation*[1], that the Secretary in charge of the Transport Department was disqualified from deciding the dispute between the Department and the private bus operators on the basis of the principle that a party cannot be a judge in his own cause, and that, as the Chief Minister was in charge of the portfolio of transport, the same infirmity attached to him also, and, therefore, for the same reason he should also be disqualified from hearing the objections to the scheme published by the Undertaking ; and (2) the Chief Minister by his acts, such as initiating the scheme, and speeches showed a clear bias in favour of the Undertaking and against the private bus operators and therefore on the basis of the principles of natural justice accepted by this Court, he was precluded from deciding the dispute between the said parties.

The learned Advocate-General sought to make out a distinction between "official bias" of an authority which is inherent in a statutory duty imposed on it and "personal bias" of the said authority in favour of, or against, one of the parties and contended that the mere fact that the Chief Minister of the Government had supported the policy of nationalization, or even the fact that the Government initiated the said scheme, did not disqualify him from deciding the dispute unless it was established that he was guilty of personal bias, and that there was no legal proof establishing the said fact.

At this stage, it would be convenient to notice briefly the decisions cited at the Bar disclosing the relevant principles governing the "doctrine of bias". The principles governing the "doctrine of bias" *vis-a-vis* judicial tribunals are well-settled and they are : (i) no man shall be a judge in his own cause; (ii) justice should not only be done but manifestly and undoubtedly seem to be done. The two maxims yield the result that if a member of a judicial body is "subject to a bias (whether financial or other) in favour of, or against, any party to a dispute, or is in such a position that a bias must be assumed to exist, he ought not take part in the decision or sit on the tribunal" ; and that "any direct pecuniary interest however small, in the subject-matter of inquiry will disqualify a Judge, and any interest though not pecuniary, will have the same effect, if it be sufficiently substantial to create a reasonable suspicion of bias". The said principles are equally applicable to authorities, though they are not Courts of justice or judicial tribunals, who have to act judicially in deciding the rights of others, *i.e.*, authorities who are empowered to discharge quasi-judicial functions. The said principles are accepted by the learned counsel on both sides; but the question raised in this case is whether,

1. (1959) S.C.J. 967 : (1959) 2 M.L.J. (S.C.) 156 : (1959) 2 An.W.R. (S.C.) 156 : A.I.R. 1959 S.C. 308.

when a statute confers a power on an authority and imposes a duty on it to be a judge of its own cause or to decide a dispute in which it has an official bias, the doctrine of bias is qualified to the extent of the statutory authorization. In *Rex* v. *Bath Compensation Authority*[1], the licensing justices of a county borough referred the application for the renewal of the licence of a hotel to the compensation authority of the borough and also resolved that a solicitor should be instructed to appear before the compensation authority and oppose the renewal of the licence on their behalf. The solicitor so instructed appeared before the authority and supported the opposition, and in the result the compensation authority refused the renewal subject to payment of compensation. It may be mentioned that a majority of the justices who sat on the compensation tribunal and voted against the renewal of the licence had as members of the licensing committee been parties to the resolution referring the question of renewal to the compensation authority. The Court of Appeal by a majority, Atkin, L.J., dissenting, held that in view of the provisions of the Licensing Act, 1910, the facts in that case did not disclose such bias or likelihood of bias as would disqualify them from sitting on the tribunal. This decision was reversed by the House of Lords on appeal (reported in L.R. 1926 A.C. 586). The House of Lords held that the decision of the tribunal, whereon three justices who referred the matter to the said authority sat, must be set aside on the ground that no one can both be a party and a judge in the same cause. Viscount Cave, L.C., meets the argument based upon the statutory duty thus, at page 592 :

> " No doubt the statute contemplates the possibility of the licensing justices appearing before the compensation authority and taking part in the argument ; for it is provided by section 19, sub-section (2), that the compensation authority shall give any person appearing to them to be interested in the question of the renewal of a licence, " including the licensing justices ", an opportunity of being heard. But the statute nowhere says that justices who elect to appear as opponents of the renewal and take active steps (such as instructing a solicitor) to make their opposition effective, may nevertheless act as judges in the dispute; and in the absence of a clear provision to that effect I think that the ordinary rule, that no one can be both party and judge in the same cause, holds good."

This decision, therefore, is an authority for the proposition that, unless the legislature clearly and expressly ordained to the contrary, the principles of natural justice cannot be violated. In *Rex* v. *Leicester Justices*[2], a case also arising under the Licensing (Consolidation) Act, 1910, the King's Bench Division held that the mere fact that the licensing justice has originated an objection to the renewal of a licence does not disqualify him by reason of interest from sitting and adjudicating as a member of that authority upon, the matter of that licence. Salter, J., brought out the distinction between the *Rex* v. *Bath Compensation Authority's Case*[1], and the case before him in the following terms, at page 565 :

> "The distinction is that, in that case, Parliament had not sanctioned what was done ; in this case, it has."

Dealing with the argument that there was some risk of bias if the statutory duty was discharged, the learned Judge rejected it with the observation that " some risk of bias is inseparable from the machinery which Parliament has set up ". At first sight this judgment appears to be inconsistent with the decision of the House of Lords in *Rex* v. *Bath Compensation Authority's Case*[1], but a scrutiny of the latter case shows that in that case the licensing justices had themselves actively opposed the renewal of the licence before the compensation authority and instructed a solicitor to do so on their behalf. This is not a duty cast on them by the statute whereas the licensing justices in dealing with an application for renewal of a licence and, when the question of renewal was referred for decision to the compensation authority, in sitting as members of that authority are merely carrying out the duties in accordance with the procedure prescribed by the Legislature. These decisions show that in England a statutory invasion of the common law objection on the ground of bias is tolerated by decisions, but the invasion is confined strictly to the limits of the statutory exception. It is not out of place here to notice that in England the Parliament is supreme and therefore a statutory law, however repugnant to the principles of natural justice, is valid ; whereas in India the law made by Parliament or a State

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1. L.R. (1925) 1 K.B. 685. 2. L.R. (1927) 1 K.B. 557.

Legislature should stand the test of fundamental rights declared in Part III of the Constitution.

In the instant case the relevant provisions of the Act do not sanction any dereliction of the principles of natural justice. Under the Act a statutory authority, called the Transport Undertaking, is created and specified statutory functions are conferred on it. The said Undertaking prepares a scheme providing for road transport service in relation to an area to be run or operated by the said Undertaking. Any person affected by the scheme is required to file objections before the State Government, and the State Government, after receiving the objections and representations, gives a personal hearing to the objectors as well as to the Undertaking and approves or modifies the scheme as the case may be. The provisions of the Act, therefore, do not authorize the Government to initiate the scheme and thereafter constitute itself a judge in its own cause. The entire scheme of the Act visualizes, in case of conflict between the Undertaking and the operators of private buses, that the State Government should sit in judgment and resolve the conflict. The Act, therefore, does not authorize the State Government to act in derogation of the principles of natural justice.

The next question is whether the State Government, in the present case, acted in violation of the said principles. The argument that as this Court held in the previous stage of this litigation that the hearing given by the Secretary in charge of the Transport Department offended the principles of natural justice we should hold, as a logical corollary to the same, that the same infirmity would attach to the Chief Minister. This argument has to be rejected on two grounds : firstly, for the reason that on the last occasion the appellants did not question the right of the Chief Minister to decide on the objections to the scheme,—and indeed they assumed his undoubted right to do so—but canvassed the validity of his order on the basis that the Secretary, who was part of the Transport Department, gave the hearing and not the Chief Minister, and, therefore, a party to the dispute was made a judge of his own cause. If, as it is now contended, on the same reasoning the Chief Minister also would be disqualified from deciding the dispute, that point should have been raised at that stage : instead, a distinction was made between the Secretary of a Department and the Chief Minister, and the validity of the order of the Chief Minister was questioned on the basis of this distinction. This Court accepted that argument. Having obtained the judgment of this Court on that basis, it would not be open to the appellants, at this stage, to reopen the closed controversy and take a contrary position. That apart, there are no merits in this contention. There is clear distinction between the position of a Secretary of the Department and the Chief Minister of the State. Under the Constitution, the Governor is directed to act on the advice of the Ministers headed by the Chief Minister. In exercise of powers conferred by clauses (2) and (3) of Article 166 of the Constitution, the Governor of Madras made rules styled as "The Madras Government Business Rules and Secretariat Instructions", and rule 9 thereof prescribes that without prejudice to the provisions of rule 7, the Minister in charge of a department shall be primarily responsible for the disposal of the business pertaining to that department. The Governor of Andhra, in exercise of the powers under the Constitution, directed that until other provisions are made in this regard the business of the Government of Andhra shall be transacted in accordance with the said Rules. It is, therefore, manifest that under the Constitution and the Rules framed thereunder a Minister in charge of a department is primarily responsible for the disposal of the business pertaining to that department, but the ultimate responsibility for the advice is on the entire Ministry. But the position of the Secretary of a department is different. Under the said Rules, the Secretary of a department is its head, *i.e.*, he is part of the department. There is an essential distinction between the functions of a Secretary and a Minister ; the former is a part of the department and the latter is only primarily responsible for the disposal of the business pertaining to that department. On this distinction the previous judgment of this Court was based, for in that case, after pointing out the position of the Secretary in that Department, it was held that

"though the formal orders were made by the Chief Minister, in effect and substance, the enquiry was conducted and personal hearing was given by one of the parties to the dispute itself.'"

We cannot, therefore, accept the argument of the learned counsel that the Chief Minister is part of the department constituted as a statutory Undertaking under the Act.

The next question is whether the Chief Minister by his acts and speeches disqualified himself to act for the State Government in deciding the dispute. In the affidavit filed by Nageswara Rao, one of the appellants herein, in respect of the writ petitions filed in the High Court, he states in ground (8) of paragraph 14 thus :

"He (the Chief Minister) is the Minister in charge of the Transport Department at whose instance the Scheme was first published under section 68-C of the Act. He is not only the initiator of the Scheme but also the person who is interested in its approval and implementation. He has thus a direct and specific connection with the dispute being a party thereto and he would be acting as a judge in his own cause when he gives a personal hearing and considers the objections."

Mr. Chatterjee contends that this allegation embodied in ground (8) has not been contradicted by the respondents. It is not correct to say that these allegations went unchallenged, for in paragraph 6 of the counter-affidavit filed on behalf of the State, we find the following statements :

"The contentions of the petitioner in paragraph 14 of his affidavit are without substance. The scheme as approved by the Government is neither illegal nor without jurisdiction."

In sub-paragraph (3) of paragraph 6, it is alleged :

"The allegation that the hearing and determination of the questions in issue are not in accordance with law or principles of judicial procedure, but only a farce gone through to satisfy the direction of the Supreme Court, is not correct."

Sub-paragraph (7) of paragraph 6 reads:

"The Minister in charge, *i.e.*, the Chief Minister can hear and decide. The State Government itself cannot be regarded as interested in the cause and therefore disqualified to decide."

Sub-paragraph (8) of the said paragraph says :

"The contention that the Chief Minister is not competent to give the hearing and consider the objections inasmuch as he is biassed and has also prejudged the issue, is not well-founded. On facts on 9th December, 1958, there was no Road Transport Department at all but a Road Transport Corporation, which is a completely autonomous body, with which the Chief Minister has no concern. Hence on the date of the enquiry, the Corporation being a completely autonomous body is an entirely independent body altogether and hence there can be no question of bias to the Chief Minister hearing the objectors. The hearing given by the Chief Minister is just like a hearing of the Court of law after remand by a Superior Court..................The allegation that the Chief Minister had closed his mind and was biased is absolutely baseless. He kept an open mind and considered all the objections fully."

The counter-affidavit further gives in detail how the scheme was initiated by Guru Pershad and how the various steps were taken in compliance with the provisions of the Act. It is therefore clear that the Government did not accept the allegations made by the appellants in their affidavits. Whatever may be the policy of the Government in the matter of nationalization of bus transport, it cannot be said that the Chief Minister initiated the scheme in question. The learned counsel then relied upon certain extracts from the reports published in the newspapers purporting to be the speeches of the Chief Minister. Exhibit IV is said to be a summary of the speech of the Chief Minister made on October 14, 1957, and the relevant portion thereof reads :

"I do not have any prejudice against the Krishna District. The bus transport in Telangana was nationalised 25 years ago. The Bus Transport Nationalisation was extended to Krishna District since it is contiguous to Telangana in regard to transport services. It will be extended to the other districts gradually. It requires 12 crores of rupees to introduce nationalisation in all the districts at the same time. The Government is aware that Nationalisation of Bus Transport is not profitable. But we should fall in line with other States and move with the times. There are 360 buses in Krishna District. I cannot give an assurance that all these would be taken over. It is regrettable that these should be subjected to severe criticism when they are being done in public interest."

This speech only reflects the policy of the Government. Exhibit V is said to be an extract from the report of the "Indian Express", dated October 18, 1957. The material part of it runs thus :

" Nationalisation of road transport services in the Andhra area was a settled fact and there was absolutely no question of going back on it..........."

This speech also only states the policy of the Government and has no reference to Krishna District or to the transport services in that district. Exhibit VI is an extract from the report in "The Hindu" dated October 25, 1957, wherein it is alleged that the Chief Minister made the following statement:

" Mr. N. Sanjiva Reddy, Chief Minister, said here to-day that the nationalised road transport in Krishna would be administered by a Corporation.

The Chief Minister, who was addressing a press conference said : 'There is no question of postponement of the decision to nationalise bus transport in that district'. ....The Chief Minister said firmly that there was no public support to the contention of the private bus operators that there should be no nationalisation."

This speech has a direct reference to the nationalization of bus transport in Krishna District and indicates a firm determination on the part of the Chief Minister not to postpone it any further. Exhibit IX is an extract from the report in the "Indian Express" dated December 13, 1957, and it reads :

" The Andhra Pradesh Chief Minister Sanjiva Reddy told pressmen here to-day that the State Government would go ahead with the implementation of its decision to extend nationalisation of bus transport to Krishna district from April 1 next."

This also indicates the Chief Minister's determination to implement the scheme of nationalization of bus transport in Krishna District from a particular date. Exhibit X is a report in 'The Mail' under the date April 1, 1958, purporting to be a speech made by the Chief Minister in inaugurating the first phase of the extension of the nationalised road transport services to Guntur and Krishna Districts by the State Road Transport Corporation. Relevant extracts of the speech read thus :

" He (the Chief Minister) considered the implementation of the scheme simple first, but he regretted to find it difficult since bus operators filed writ petitions in the High Court, raised a 'huge noise' and fought till the very end against the scheme and finally even approached the Congress President Mr. U. N. Dhebar to save them.......................

Mr. Sanjiva Reddy affirmed that the Government was determined to implement the scheme of nationalization of bus transport services against all opposition and persons like him trained by the late T. Prakasam were never afraid of opposition."

If it had been established that the Chief Minister made the speeches extracted in Exhibits VI, IX and X, there would have been considerable force in the argument of the learned counsel for the appellants ; but no attempt was made to prove that the Chief Minister did in fact make those speeches. It is true that the extracts from the newspapers were filed before the Chief Minister and they were received subject to proof ; but no person who heard the Chief Minister making those speeches filed an affidavit before him. The Chief Minister did not admit that he made the statements attributed to him. The Chief Minister in his order approving the scheme says :

"As regards the paper cuttings, I may mention that in the course of a long and varied political career I have made hundreds of statements on many an occasion and many of them may be purely personal opinions. Moreover, it is not always that the press people consult the persons on the accuracy of the statements made before they are published. The press cuttings filed before me are not communiques issued by the Government, with the approval of the Government. They are published records of several statements said to have been made by me on various occasions. It is common knowledge press cuttings here and there, torn out of context, will give a completely twisted picture and version of a man's real intentions. It is not possible for me to state anything definite about the veracity of these statements said to have been made by me at different points of time. It is quite possible that I might have made many such, on many an occasion, and it is also quite possible, that some points spoken here and there may have been published with headlines in the papers. It is not possible nor desirable to treat paper cuttings of statements said to have been made on several occasions as legal evidence in the judicial enquiry."

Notwithstanding the fact that the Chief Minister did not accept the correctness of the statements attributed to him in the newspapers, no attempt was made by the appellants to file any affidavit in the High Court sworn to by persons who had attended the meetings addressed by the Chief Minister and heard him making the said statements. In the circumstances, it must be held that it has not been established by the appellants that the Chief Minister made the speeches indicating his closed

mind on the subject of nationalisation of bus transport in Krishna District. If these newspaper cuttings are excluded from evidence, the factual basis for the appellants' argument disappears. We, therefore, hold that the Chief Minister was not disqualified to hear the objections against the scheme of nationalisation.

A subsidiary argument is raised on the basis of rule 11 of the Andhra Pradesh Motor Vehicles Rules. It is contended that the Road Transport Authority made an order rendering the permits of the appellants ineffective without giving them due notice as required by that rule and therefore the said order was invalid. Rule 11 of the said Rules reads :

"In giving effect to the approved scheme, the Regional Transport Authority or Authorities concerned shall, before eliminating the existing services or cancelling any, existing permit or modifying the conditions of the existing permit so as to—

(i) render the permit inffective beyond a specified date ;

(ii) reduce the number of vehicles authorised to be used under a permit ; or

(iii) curtail the area or route covered by the permit in so far as such permit relates to the notified route :

"Give due notice to the persons likely to be affected in the manner prescribed in these rules."

This rule will have to be read along with section 68-F, sub-section (2), which reads :

"For the purpose of giving effect to the approved scheme in respect of a notified area or notified route, the Regional Transport Authority may, by order,—

(a) refuse to entertain any application for the renewal of any other permit ;

(b) cancel any existing permit ;

(c) modify the terms of any existing permit so as to—

(i) render the permit ineffective beyond a specified date ;

(ii) reduce the number of vehicles authorised to be used under the permit ;

(iii) curtail the area or route covered by the permit in so far as such permit relates to the notified area or notified route."

A combined reading of section 68-F (2) and rule 11 makes it clear that the order contemplated under the said sub-section can be made by the Regional Transport Authority only after giving due notice to the persons likely to be affected by the said order. On December 24, 1958, the Regional Transport Authority made the following order :

"The permits of the following buses are rendered ineffective beyond 24th December, 1958, under section 68-F (2) (c) (i) of Motor Vehicles Act, 1939 (as amended by Act C of 1956) for the purpose of giving effect to the approved scheme of nationalisation in respect of the following notified routes."

The routes on which the appellants were operating their buses were also included in the routes mentioned in the order. On December 24, 1958, the Regional Transport Authority issued an order to the operators directing them to stop plying their buses on their respective routes from December 25, 1958, and that order was served on the appellants on the same day, *i.e.*, December 24, 1958. Though the learned Advocate-General suggested that the provisions of rule 11 have been satisfied in the present case, we find it impossible to accede to his contention. There are two defects in the procedure followed by the Regional Transport Authority: (i) while the rule enjoins on the Authority to issue notice to the persons affected before making the relevant order, the Authority made the order and communicated the same to the persons affected ; and (ii) while the rule requires due notice, *i.e.*, reasonable notice, to be given to the persons affected to enable them to make representations against the order proposed to be passed, the Regional Transport Authority gave them only a day for complying with that order, which in the circumstances could not be considered to be due notice within the meaning of the rule. We have, therefore, no hesitation to hold that the Regional Transport Authority did not strictly comply with the provisions of the rule. But, in view of the supervening circumstances, the High Court, while noticing this defect in the procedure followed by the

Regional Transport Authority, refused to exercise its jurisdiction under Article 226 of the Constitution. Pursuant to the order of the Regional Transport Authority the appellants withdrew their vehicles from the concerned routes and the vehicles of the Road Transport Corporation have been plying on those routes. The judgment of this Court conclusively decided all the questions raised in favour of the respondents, and if the order of the Regional Transport Authority was set aside and the appellants were given another opportunity to make their representations to that Authority, it would be, as the High Court says, only an empty formality. As their vehicles have already been withdrawn from the routes and replaced by the vehicles of the Corporation, the effect of any such order would not only (not *sic*) be of any help to the appellants but would introduce unnecessary complication and avoidable confusion. In the circumstances, it appears to us that, as the appellants, have failed all along the line, to interfere on a technical point of no practical utility is " to strain at a gnat after swallowing a camel ". We cannot, therefore, say that the High Court did not rightly exercise its discretion in this matter. The appeals fail and, in the circumstances, are dismissed without costs.

Appeals dismissed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. J. IMAM AND K. N. WANCHOO, JJ.

Vishwanath .. *Appellant.**

v.

The State of Uttar Pradesh .. *Respondent.*

Penal Code (XLV of 1860), *sections* 97 *to* 100—*Right of private defence—Extent—When extends to causing death.*

When the accused's sister was being abducted, even though by her husband, and there was an assault on her and she was compelled by force to go away from her father's place, the accused would have the right of private defence of the body of his sister against an assault with the intention of abducting her by force and that right would extend to the causing of death.

Considering that the accused had given only one blow with an ordinary knife which, if it had been a little this way or that, could not have been fatal, it cannot be said that he inflicted more harm than was necessary for the purpose of defence. *Emperor* v. *Ram Saiya*, I.L.R. (1948) All. 165, overruled.

Appeal by Special Leave from the Judgment and Order, dated the 26th April, 1957, of the Allahabad High Court in Criminal Appeal No. 992 of 1954, arising out of the Judgment and Order, dated the 25th January, 1954, of the Additional Sessions Judge, Gorakhpur, in Sessions Trial No. 71 of 1953.

S. P. Sinha, Senior Advocate (*S. D. Sekhri*, Advocate, with him), for Appellant.

G. C. Mathur and *C. P. Lal*, Advocate for *G. N. Dikshit*, Advocate, for Respondent.

The Judgment of the Court was delivered by

Wanchoo, J.—This is an appeal by Special Leave against the judgment of the Allahabad High Court in a criminal matter. The facts of the case, as found by the High Court, are no longer in dispute and the question that is raised in this appeal is whether the appellant had exceeded the right of private defence of person. The relevant facts for our purposes are these. Gopal deceased was married to the sister of the appellant. The appellant and his father Badri were living in a railway quarter at Gorakhpur. Gopal's sister was married to one Banarsi, who was also living in another railway quarter nearby. Gopal had been living for some time with his father-in-law. They did not, however, pull on well together and Gopal shifted to the house of Banarsi. Badri persuaded Gopal to come back to his house but the relations remained strained and eventually Gopal shifted again to the quarter of Banarsi about 15 days before the present occurrence which took place on 11th June, 1953, at about 10 P.M. Gopal's wife had continued to live with her

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*Criminal Appeal No. 32 of 1958. 3rd September, 1959.

father as she was unwilling to go with Gopal. Her father Badri and her brother Vishwanath appellant sided with her and refused to let her go with Gopal. Gopal also suspected that she had been carrying on with one Moti who used to visit Badri's quarter. Consequently, Gopal was keen to take away his wife, the more so as he had got a job in the lace department some months before and wanted to lead an independent life. On 11th June, there was some quarrel between the appellant and Gopal about the girl ; but nothing untoward happened then and the appellant went back to his quarter and Gopal went away to Banarsi's quarter. Gopal asked Banarsi's sons to help in bringing back his wife. Banarsi also arrived and then all four of them went to Badri's quarter to bring back the girl. On reaching the place, Banarsi and his two sons stood outside while Gopal went in. In the meantime, Badri came out and was asked by Banarsi to let the girl go with her husband. Badri was not agreeable to it and asked Banarsi not to interfere in other people's affairs. While Badri and Banarsi were talking, Gopal came out of the quarter dragging his reluctant wife behind him. The girl caught hold of the door as she was being taken out and a tug-of-war followed between her and Gopal. The appellant was also there and shouted to his father that Gopal was adamant. Badri thereupon replied that if Gopal was adamant, he should be beaten (*to maro*). On this the appellant took out a knife from his pocket and stabbed Gopal once. The knife penetrated into the heart and Gopal fell down senseless. Steps were taken to revive Gopal but without success. Thereupon Gopal was taken to the hospital by Badri and the appellant and Banarsi and his sons and some others but Gopal died by the time they reached the hospital.

On these facts the Sessions Judge was of opinion that Badri who had merely asked the appellant to beat Gopal could not have realised that the appellant would take out a knife from his pocket and stab Gopal. Badri was, therefore, acquitted of abetment. The Sessions Judge was further of opinion that the appellant had the right of private defence of person and that this right extended even to the causing of death as it arose on account of an assault on his sister which was with intent to abduct her. He was further of opinion that more harm than the circumstances of the case required was not caused ; and therefore the appellant was also acquitted.

The State then appealed to the High Court against the acquittal of both accused. The High Court upheld the acquittal of Badri. The acquittal of the appellant was set aside on the ground that the case was not covered by the fifth clause of section 100 and that the right of private defence of person in this case did not extend to the voluntary causing of death to the assailant and therefore it was exceeded. The High Court relied on an earlier decision of its own in *Emperor* v. *Ram Saiya*[1]. The appellant was therefore convicted under section 304, Part II of the Penal Code and sentenced to three years' rigorous imprisonment. He applied for a certificate to enable him to appeal to this Court but this was refused. Thereupon he applied to this Court for Special Leave which was granted ; and that is how the matter has come up before us

The main question therefore that falls for consideration in this appeal is whether the decision in *Ram Saiya's case*[1] is correct. It appears that four other High Courts have taken a view which is different from that taken in *Ram Saiya's case*[1], namely, *Jagat Singh* v *King-Emperor*[2], *Daroga Lohar* v *Emperor*[3], *Sakhu* v. *The State*[4] and *Dayaram Laxman* v. *State*[5]. There is, however, no discussion of the point in these four cases and we need not refer to them further. The view taken in *Ram Saiya's case*[1] is that the word " abducting " used in the fifth clause of section 100 of the Penal Code refers to such abducting as is an offence under that Code and not merely to the act of abduction as defined in section 362 thereof. Mere abduction is not an offence and, therefore, cannot give rise to any right of private defence and the extended right of private defence given by section 100 only arises if the offence which occasions the exercise of the right is of one of the kinds mentioned in section 100.

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1. I.L.R. (1948) All. 165.
2. A.I.R. 1923 Lah. 155.
3. A.I.R. 1930 Pat. 347.
4. A.I.R. 1951 Nag. 349.
5. A.I.R. 1953 Madh. B. 182.

Section 97 gives the right of private defence of person against any offence affecting the human body. Section 99 lays down that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. Section 100 with which we are concerned is in these terms:—

"The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right to be of any of the descriptions hereinafter enumerated, namely—

"*First*—Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly—Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the conesqence of such assault;

Thirdly—An assault with the intention of committing rape;

Fourthly—An assault with the intention of gratifying unnatural lust;

Fifthly—An assault with the intention of kidnapping or abducting;

Sixthly—An assault with the intention of wrongfully confining a person under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release."

The right of private defence of person only arises if there is an offence affecting the human body. Offences affecting the human body are to be found in Chapter XVI from section 299 to section 377 of the Penal Code and include offences in the nature of use of criminal force and assault. Abduction is also in Chapter XVI and is defined in section 362. Abduction takes place whenever a person by force compels or by any deceitful means induces another person to go from any place. But abduction pure and simple is not an offence under the Penal Code. Only abduction with certain intent is punishable as an offence. If the intention is that the person abducted may be murdered or so disposed of as to be put in danger of being murdered, section 364 applies. If the intention is to cause secret and wrongful confinement, section 365 applies. If the abducted person is a woman and the intention is that she may be compelled or is likely to be compelled to marry any person against her will or may be forced or seduced to illicit intercourse or is likely to be so forced or seduced, section 366 applies. If the intention is to cause greivous hurt or so dispose of the person abducted as to puthim in danger of being subjected to grievous hurt, or slavery or to the unnatural lust of any person, section 367 applies. If the abducted person is a child under the age of ten and the intention is to take dishonestly any movable property from its person, section 369 applies. It is said that unless an offence under one of these sections is likely to be committed, the fifth clause of section 100 can have no application. On a plain reading, however, of that clause there does not seem to be any reason for holding that the word "abducting" used there means anything more than what is defined as "abduction" in section 362. It is true that the right of private defence of person arises only if an offence against the human body is committed. Section 100 gives an extended right of private defence of person in cases where the offence which occasions the exercise of the right is of any of the descriptions enumerated therein. Each of the six clauses of section 100 talks of an assault and assault is an offence against the human body: (*see* section 352). So before the extended right under section 100 arises there has to be the offence of assault and this assault has to be of one of the six types mentioned in the six clauses of the section. The view in *Ram Saiya's case*[1] seems to overlook that in each of the six clauses enumerated in section 100, there is an offence against the human body, namely, assault. So the right of private defence arises against the offence, and what section 100 lays down is that if the assault is of an aggravated nature, as enumerated in that section, the right of private defence extends even to the causing of death. The fact that when describing the nature of the assault some of the clauses in section 100 use words which are themselves offences, as, for example, "grievous hurt", "rape", "kidnapping", "wrongfully confining", does not mean that the intention with which the assault is committed must always

1. I.L.R. (1948) All. 165.

be an offence in itself. In some other clauses, the words used to indicate the intention do not themselves amount to an offence under the Penal Code. For example, the first clause says that the assault must be such as may reasonably cause the apprehension of death. Now death is not an offence anywhere in the Penal Code. Therefore, when the word " abducting " is used in the fifth clause, that word by itself need not be an offence in order that that clause may be taken advantage of by or on behalf of a person who is assaulted with intent to abduct. All that the clause requires is that there should be an assault which is an offence against the human body and that assault should be with the intention of abducting, and whenever these elements are present the clause will be applicable.

Further the definition of " abduction " is in two parts, namely, (i) abduction where a person is compelled by force to go from any place and (ii) abduction where a person is induced by any deceitful means to go from any place. Now the fifth clause of section 100 contemplates only that kind of abduction in which force is used and where the assault is with the intention of abducting, the right of private defence that arises by reason of such assault extends even up to the causing of death. It would in our opinion be not right to expect from a person who is being abducted by force to pause and consider whether the abductor has further intention as provided in one of the sections of the Penal Code quoted above, before he takes steps to defend himself, even to the extent of causing death of the person abducting. The framers of the Code knew that abduction by itself was not an offence unless there was some further intention coupled with it. Even so in the fifth clause of section 100 the word "abducting" has been used without any further qualification to the effect that the abducting must be of the kind mentioned in section 364 onwards. We are therefore of opinion that the view taken in *Ram Saiya's case*[1] is not correct and the fifth clause must be given full effect according to its plain meaning. Therefore, when the appellant's sister was being abducted, even though by her husband, and there was an assault on her and she was being compelled by force to go away from her father's place, the appellant would have the right of private defence of the body of his sister against an assault with the intention of abducting her by force and that right would extend to the causing of death.

The next question is whether the appellant was within the restrictions prescribed by section 99. It was urged that the right of private defence never extends to the inflicting of more harm than what is necessary for the purpose of defending and that in this case the appellant inflicted more harm than was necessary. We are of opinion that this is not so. The appellant gave only one blow with a knife which he happened to have in his pocket. It is unfortunate that the blow landed right into the heart and therefore Gopal died. But considering that the appellant had given only one blow with an ordinary knife which, if it had been a little this way or that, could not have been fatal, it cannot be said that he inflicted more harm than was necessary for the purpose of defence. As has been pointed out in *Amjad Khan* v. *The State*[2], " these things cannot be weighed in too fine a set of scales or ' in golden scale ' ".

We, therefore, allow the appeal and hold that the appellant had the right of private defence of person under the fifth clause of section 100 and did not cause more harm than was necessary and acquit him.

Appeal allowed.

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1. I.L.R. (1948) All. 165.
2. (1952) S.C.J. 227 : (1952) 2 M.L.J. 97 : (1952) S.C.R. 567.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, P. B. GAJENDRAGADKAR AND K. N. WANCHOO, JJ.

The Manager, Hotel Imperial, New Delhi .. *Appellant**.

v.

The Chief Commissioner, Delhi and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947), *section* 10—*Reference under—Validity—Essentials.*

Where the two parties to the dispute are clearly indicated, namely, (1) the employer which is the management of the hotel and (2) the workmen employed in the hotel, the reference is valid and it does not become incompetent simply because it is mentioned therein that the workmen will be represented by such and such Union in the dispute. Though the reference mentions the Union itself, such Union can be served through some officer, such as its president or secretary and it is that officer who will really represent the workmen before the Tribunal.

It is unnecessary for the purposes of section 10 of the Industrial Disputes Act where the dispute is of a general nature relating to the terms of employment or conditions of labour of a body of work. men, to mention the names of particular workmen who might have been responsible for the dispute. It is only when a dispute refers to dismissal, etc., of particular workmen as represented by the Union that it may be desirable to mention the names of the workmen concerned. (In the instant case names of workmen to whom notice of dismissal had been given were mentioned in the order of reference and the order of reference cannot be attacked as vague.)

Appeal from the Judgment and Order, dated the 25th November, 1955, of the Circuit Bench of the Punjab High Court at Delhi, in Civil Writ Application No. 189-D of 1955.

Jai Gopal Sethi, Senior Advocate (*J. B. Dadachanji, S. N. Andley, Rameshwar Nath* and *P. L. Vohra*, Advocates of *Messrs. Rajinder Narain & Company*, with him), for Appellant.

R. H. Dhebar and *T. M. Sen*, Advocates, for Respondent No. 1.

G. S. Pathak, Senior Advocate (*V. P. Nayar* and *Janardan Sharma*, Advocates, with him), for Respondent No. 3.

The Judgment of the Court was delivered by

Wanchoo, J.—This appeal comes before us on a certificate granted by the Punjab High Court under Article 133 (1) (*a*) and (*c*) of the Constitution. The appellant is the Manager, Hotel Imperial, New Delhi (hereinafter called the hotel) while the respondents are the Chief Commissioner, Delhi, the Additional Industrial Tribunal, Delhi and the Hotel Workers' Union, Katra Shahanshahi, Chandni Chowk, Delhi. The main contesting respondent is respondent No. 3 (hereinafter called the Union). A dispute arose between the hotel and its workmen in October, 1955. It was referred to an Industrial Tribunal on 12th October, 1955, by the Chief Commissioner of Delhi. The portion of the order of reference, relevant for our purposes, is in these terms—

"WHEREAS from a report submitted by the Director of Industries and Labour, Delhi, under section 12 (4) of the Industrial Disputes Act, 1947, as amended, it appears that an industrial dispute exists between the management of the Hotel Imperial, New Delhi and its workmen as represented by the Hotel Workers' Union, Katra Shahanshahi, Chandni Chowk, Delhi ;

"AND WHEREAS on a consideration of the said report the Chief Commissioner, Delhi, is satisfied that the said dispute should be referred to a Tribunal."

Then follows the order referring the dispute to the Additional Industrial Tribunal, Delhi, including the terms of reference. Soon after the hotel filed a writ application in the Punjab High Court challenging the order of reference on a variety of grounds. The writ application was heard by the High Court and dismissed on 25th November, 1955. The hotel then applied for leave to appeal to this Court, which was granted on 13th January, 1956. The hotel obtained stay of the proceedings before the Additional Industrial Tribunal from this Court on 27th

* Civil Appeal No. 291 of 1956. 13th May, 1959.

February, 1956. That is how this dispute which would have been otherwise decided long ago is still in its initial stage.

The main contention on behalf of the hotel is that the reference is incompetent and two grounds have been urged in support of it, namely, (1) the Union could not be made a party to the reference under the Industrial Disputes Act, 1947, (hereinafter called the Act) ; and (2) the reference was vague, as it did not indicate how many of the 480 workers of thirty different categories working in the hotel were involved in the dispute. We are of opinion that there is no force in these grounds of attack. An "industrial dispute" for our purposes has been defined in section 2 (*k*) of the Act as meaning "any dispute or difference between employers and workmen. . . . . . which is connected with the employment or non-employment or the terms of employment or with the conditions of labour of any person." Section 10 (1) of the Act gives power to the appropriate Government where it is of opinion that an industrial dispute exists or is apprehended to refer the dispute to a Tribunal for adjudication. It cannot be denied on the facts of this case that there was a dispute between the hotel and its workmen and it went to this length that the hotel decided to dismiss a large number of workmen on 7th October, 1955. It is also undoubted that the dispute was with respect to the terms of employment or conditions of labour of the workmen. The Chief Commissioner would therefore have power under section 10 (1) of the Act to make a reference of the dispute to a Tribunal for adjudication. The attack of the hotel is on the form in which the reference was made and the contention is that the reference in this form is incompetent. We have already set out the relevant part of the order of reference giving the form in which it was made. The two parties to the dispute are clearly indicated, namely, (1) the employer which is the management of the hotel and (2) the workmen employed in the hotel. The objection, however, is that the words "as represented by the Hotel Workers' Union, Katra Shahanshahi, Chandni Chowk, Delhi" which appear in the order of reference make it incompetent, inasmuch as the Union could not be made a party to the reference. We are of opinion that this objection is a mere technicality, which does not affect the competence of the order of reference. The fact remains that the dispute which was referred for adjudication was between the employer, namely, the management of the hotel, and its employees, which were mentioned as its workmen. The addition of the words "as represented by the Hotel Workers' Union, Katra Shahanshahi, Chandni Chowk, Delhi" was merely for the sake of convenience so that the Tribunal may know to whom it should give notice when proceeding to deal with the reference. That however did not preclude the workmen, if they wanted to be represented by any other Union, to apply to the Tribunal for such representation or even to apply for being made parties individually. Section 36 of the Act provides that a workman who is a party to a dispute shall be entitled to be represented in any proceeding under the Act by (*a*) an officer of a Trade Union of which he is a member, or (*b*) an officer of a Federation of Trade Unions to which the Trade Union of which he is a member is affiliated; or (*c*) where the workman is not a member of any Trade Union, by an officer of any Trade Union connected with, or by any other workman employed in the industry in which the workman is employed. The fact therefore that in the order of reference the quoted words were added for the sake of convenience as to where the notice to the workmen should be sent would not in our opinion make the reference incompetent. The objection further is that even if the workman is entitled to be represented by an officer of a Trade Union of which he is a member, the reference in this case does not mention any officer of the Trade Union, but mentions the Union itself. This in our opinion is a technicality, upon technicality, for the Union not being a living person can only be served through some officer, such as its president or secretary and it is that officer who will really represent the workmen before the Tribunal. We are therefore of opinion that the reference which is otherwise valid does not become incompetent simply because it is mentioned therein that the workmen will be represented by such and such Union in the dispute. We may in this connection point out that the large majority of references under the Act which we have

come across are usually in this form and the reason for it is obvious, namely, the convenience of informing the tribunal to whom it should send a notice on behalf of the workmen, whose number is generally very large. We, therefore, reject the contention that the reference is bad simply because in the order of reference the words "as represented by the Hotel Workers' Union, Katra Shahanshahi, Chandni Chowk, Delhi" have been added.

Equally, we see no force in the other ground of attack, namely, that the reference is bad because it does not specify how many of the 480 workmen of thirty different categories were involved in the dispute. It is, in our opinion, unnecessary for the purposes of section 10 where the dispute is of a general nature relating to the terms of employment or conditions of labour of a body of workmen, to mention the names of particular workmen who might have been responsible for the dispute. It is only where a dispute refers to the dismissal, etc., of particular workmen as represented by the union that it may be desirable to mention the names of the workmen concerned. In this case, the dispute was also about workmen to whom notice of dismissal had been given and in that connection the names of the workmen concerned were mentioned in the order of reference. We may, in this connection, refer to *State of Madras* v. *C. P. Sarathy and another*[1], where a similar attack on the competence of a reference was made on the ground of vagueness. In that case, the reference was in these terms:

> "WHEREAS an industrial dispute has arisen between the workers and management of the cinema talkies in the Madras City in respect of certain matters:
>
> "AND WHEREAS in the opinion of His Excellency the Governor of Madras, it is necessary to refer the said industrial dispute for adjudication;"

Thereafter followed the order of reference, which did not even contain the terms of reference. The order, however, indicated that

> "the Industrial Tribunal may, in its discretion, settle the issues in the light of a preliminary enquiry which it may hold for the purpose and thereafter adjudicate on the said industrial dispute."

The Commissioner of Labour was requested to send copies of the order to the managements of cinema talkies concerned. It was held there that

> "the reference to the Tribunal under section 10 (1) of the Industrial Disputes Act, 1947, cannot be held to be invalid merely because it did not specify the disputes or the parties between whom the disputes arose."

It was further held that

> "the Government must, of course, have sufficient knowledge of the nature of the dispute to be satisfied that it is an industrial dispute within the meaning of the Act, as, for instance, that it relates to retrenchment or reinstatement. But, beyond this no obligation can be held to lie on the Government to ascertain particulars of the disputes before making a reference under section 10 (1) or to specify them in the order."

The present reference as compared to the reference in that case cannot be called vague at all. Here the parties to the dispute are clearly specified, namely, (i) the management of the hotel, and (ii) its workmen. The nature of the dispute is also specified in the terms of reference. It was, in our opinion, entirely unnecessary to mention in the order of reference as to who were the workmen who were responsible for the dispute. We are, therefore, of opinion that this attack on the ground of vagueness also fails. There is no force in this appeal and it is hereby dismissed with costs to respondents No. 3. In view of the fact that more than three years have passed since the reference was made, we trust that the Additional Industrial Tribunal will now dispose of the matter as expeditiously as it can.

Appeal dismissed.

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1. (1953) S.C.J. 39: (1953) 1 M.L.J. 212: (1953) S.C.R. 334.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, S. K. DAS, A. K. SARKAR, K. N. WANCHOO AND M. HIDAYATULLAH, JJ.

Rajah Velugoti Venkata Sesha Varada Rajagopala Krishna Yachendra Bahadur, Kumararajah, Venkatagiri .. *Appellant**

v.

The State of Andhra Pradesh and another .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *section* 20—*Scope and effect —Mineral Concession Rules* (1949), *rule* 47—*Applicability and effect.*

The scheme of the Madras Estates (Abolition and Conversion into Ryotwari) Act, section 20, is to render ineffective all rights created after July 1, 1945, for a period exceeding one year. In one view of the matter it may well be taken as meaning that the creation of rights after July 1, 1945, is, by the force of the second proviso itself, void as against the Government without any further necessity for any overt act to be done by the Government to avoid the same. In that sense the second proviso would be a self-contained provision and the aid of the third proviso would be wholly uncalled for. But assuming that the effect of the second proviso is to make the rights created after July 1, 1945, only voidable and not void, all that follows is that the Government must do something to avoid them. There is no warrant for saying that the avoidance must be under the terms of the third proviso. If the third proviso at all applied to rights created after July 1, 1945, then the second proviso would be otiose and need not have been enacted at all. The third proviso deals with the termination of rights created before July 1, 1945. The second proviso makes rights created after July 1, 1945, unenforceable as against Government. The second proviso was enacted to nullify the creation of rights in anticipation of the impending legislation, and hence it was made unconditional. If any condition was intended to be super-imposed on the rights of the Government to terminate rights created after July 1, 1945, one would have expected those conditions to be mentioned in the second proviso itself. When a slate quarrying lease is determined under the second proviso the terms as to renewal implied under rule 47 of the Mineral Concession Rules must fall with the lease.

Appeals from the Judgment and Order, dated the 20th November, 1957, of the Andhra Pradesh High Court in Writ Petitions Nos. 1 of 1956, 19 and 470 of 1957[1].

A. V. Viswanatha Sastri, Senior Advocate (*V. Vedantachari* and *K. Sundararajan*, Advocates, with him), for Appellant.

H. N. Sanyal, Additional Solicitor-General of India, (*D. Venkatappiah Sastri* and *T. M. Sen*, Advocates, with him), for Respondent No. 1.

K. R. Chaudhuri, Advocate, for Respondent No. 2.

The Judgment of the Court was delivered by

Das, C.J.—These three appeals are directed against the judgment and order pronounced by a Bench of the Andhra Pradesh High Court on November 20, 1957[1], whereby three writ petitions, namely, No. 1 of 1956, No. 19 of 1957 and No. 470 of 1957, which had been filed by the appellant and were heard together, were dismissed with costs. These appeals have been filed with certificates granted by the High Court of Andhra Pradesh.

The circumstances under which the three writ petitions came to be filed by the appellant may now be narrated. It is alleged that on January 10, 1942, an agreement was entered into between the Rajah of Venkatagiri and one Sri Balumuri Nageswara Rao whereby the Rajah agreed to give annual leases in respect of certain slate quarries within his estate for five years in succession commencing from February, 1942, if the Rajah was satisfied with the work carried on by the lessee during the preceding year. It was further stipulated that if the leases were given continuously for five years, then the lessee would be entitled at the end of the fifth year to obtain a lease from the Rajah for a period of 20 years commencing from the termination of the fifth year. On the expiry of the fifth year, however, the Rajah

* C.As. Nos. 188 to 190 of 1958. 14th August, 1959.

1. (1958) 1 An. W.R. 459.

granted another lease to the said Balumuri Nageswara Rao for a short period commencing from February 1, 1947, and ending on November 30, 1947. On December 10, 1947, the said Balumuri Nageswara Rao is said to have assigned his right, title and interest under the said agreement, dated January 10, 1942, to the appellant, one of the sons of the Rajah. The Rajah on the same day granted a lease for twenty years to the appellant. On September 7, 1949, the Venkatagiri estate was notified under section 3 of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Mad. XXVI of 1948), hereinafter referred to as the Abolition Act. On the same date the appellant applied to the Collector for confirmation of the lease granted by the Rajah to him. Nothing appears to have happened until February 12, 1952, when a notice was issued from the office of the Board of Revenue (Andhra) calling upon the appellant to show cause within two months from the date of receipt of notice as to why the lease should not be terminated without any compensation under the second proviso to section 20 (1) of the Abolition Act. The appellant showed cause which apparently did not satisfy the said authorities. Instructions appear to have been issued to the manager of the Venkatagiri estate requiring him to take over possession of the slate quarries which were then being worked by the appellant immediately after the expiry of two months notice issued to him. The appellant promptly filed a Writ Petition No. 287 of 1952 in the Madras High Court praying for the issue of a writ in the nature of a writ of *mandamus* directing the Madras State to forbear from terminating the leasehold right of the petitioner in the slate quarries and from interfering with his possession and working of the slate quarries and other ancillary reliefs. The writ petition having come up for hearing before Umamaheswaram, J., the learned Judge on July 18, 1955, made an order directing the Government to hold an enquiry under section 20 of the Abolition Act and decide whether the lease had been granted prior or subsequent to July 1, 1945. The order required the Government to hold the enquiry and pass the appropriate orders within three months from the date of that order. The Board of Revenue caused an enquiry to be made by the Director of Settlements who, after taking evidence, oral and documentary, made his report to the Board of Revenue. The Board of Revenue submitted a report to the Government on October 20, 1955, and the Government after considering the Board's report instructed the latter to dispose of the case on merits. Thereupon the Board of Revenue passed an order on December 27, 1955, declaring that the lease to the appellant had been granted subsequent to July 1, 1945, and that, as the lease was for a period exceeding one year, it was not enforceable against the Government, according to the second proviso to section 20 (1) of the Abolition Act. On that finding the Board of Revenue declined to ratify the lease and terminated it under the powers delegated to it under the Rules framed under the Abolition Act. The Board of Revenue also directed the Collector to take possesssion of the slate quarries from the appellant. The appellant promptly filed Writ Petition No.1 of 1956 praying for the issue of a writ of *mandamus* directing the State of Andhra Pradesh to forbear from terminating his leasehold right in the slate quarries. He filed another petition, being Writ Petition No. 19 of 1957, for the issue of a writ of *certiorari* to quash the order made by the Board of Revenue on December 27, 1955.

In the meantime on September 21, 1955, the appellant had applied to the Board of Revenue, Andhra, for renewal of the lease under rule 47 of the Mineral Concession Rules, 1949. That application was dismissed on May 23, 1957. The appellant thereupon filed a Writ Petition No. 470 of 1957 for quashing the last mentioned order passed by the Board of Revenue, or, in the alternative, for the issue of a writ of *mandamus* directing the State of Andhra Pradesh to issue a fresh lease in accordance with rule 47 of the Mineral Concession Rules, 1949. All these writ petitions were heard together and were disposed of by a common judgment against which these appeals have been filed.

The principal question canvassed before us is that the termination of the appellant's lease by the order, dated December 27, 1955, was bad as it did not give three months' notice to the appellant or provide for any compensation as

required by section 20 of the Abolition Act. The answer to the question depends on a true construction of that section which runs thus :—

"20. *Saving of rights of certain lessees and others.*—(1) In cases not governed by sections 18 and 19, where before the notified date, a landholder has created any right in any land (whether by way of lease or otherwise) including rights in any forest, mines or minerals, quarries, fisheries or ferries, the transaction shall be deemed to be valid ; and all rights and obligations arising thereunder, on or after the notified date, shall be enforceable by or against the Government :

Provided that the transaction was not void or illegal under any law in force at the time :

Provided further that any such right created on or after the 1st day of July, 1945, shall not be enforceable against the Government, unless it was created for a period not exceeding one year :

Provided also that where such right was created for a period exceeding one year, unless it relates to the private land of the landholder within the meaning of section 3, clause (10), of the Estates Land Act, the Government may, if, in their opinion, it is in the public interest to do so, by notice given to the person conerned, terminate the right with effect from such date as may be specified in the notice, not being earlier than three months from the date thereof.

(2) The person, whose right has been terminated by the Government under the foregoing proviso, shall be entitled to compensation from the Government which shall be determined by the Board of Revenue in such manner as may be prescribed, having reagard to the value of the right and the unexpired portion of the period for which the right was created. The decision of the Board of Revenue shall be final and not be liable to be questioned in any Court of Law."

The Long Title and the Preamble to the Abolition Act indicate, it is urged, that the object of the Act is to provide for the acquisition of the rights of landholders and that the policy of the Act is not to interfere with the rights of other persons in the estate. This assumption, however, is not borne out by the substantive provisions of the Act itself. Section 3 sets forth the consequences which ensue on the notification of an estate and it is clear that on an estate being notified the entire estate is to stand transferred to the Government and all rights and interests created in or over the estate before the notified date by the principal or any other landholder must, as against the Government, cease and determine.

We are next reminded that the Abolition Act was enacted when section 299 of the Government of India Act, 1935, was in force. Under that section no property could be acquired save for a public purpose and save by authority of a law which provides for compensation. The Abolition Act was enacted by the Madras Legislature in exercise of the legislative power conferred on it by the Government of India Act, 1935. According to learned counsel for the appellant, the Court must assume that the Madras Legislature acted properly and within the limits of the powers conferred on it. The Court must, therefore, interpret the provisions of the Abolition Act on the footing that it is a valid piece of legislation and that its provisions do not offend section 299 of the Government of India Act, 1935. The Abolition Act is a law for the compulsory acquisition of property and, therefore, the Court must put that interpretation on the relevant sections which will result in the payment of compensation to the person who is deprived of his property. It may be conceded that normally this is the correct approach to the problem, but the argument loses much of its force, when we advert to the provisions of Articles 31 (6) and 31-B of the Constitution of India read with the Ninth Schedule thereto. Those provisions proceed on the assumption that certain laws passed under the Government of India Act, 1935, did offend section 299 of that Act and expressly save those Acts. The Abolition Act is one of the Acts included in the Ninth Schedule and is protected by Article 31-B. In the circumstances, the Court must interpret the Abolition Act as it finds it by giving the ordinary and natural meaning to the words used by the Madras Legislature and uninfluenced by any pre-conceived notion as to validity of the Abolition Act.

Provision for payment of compensation for the determination of rights created before the notified date is provided in sub-section (2) of section 20 of the Abolition Act. Under that sub-section a person can claim compensation only when his right is terminated by the Government under "the foregoing proviso". The words "foregoing proviso", it is conceded, refer to the third proviso to sub-section (1). The endeavour of learned counsel for the appellant, therefore, is to induce us to hold that the termination of the appellant's leasehold rights which

were created on or after July 1, 1945, could only be done under the third proviso, for otherwise the provisions of sub-section (2) which provide for compensation will not be attracted. Action taken by the Government under the third proviso to sub-section (1) can be supported only if the conditions laid down in that proviso can be shown to have been complied with, namely, that the Government had formed the opinion that it was in the public interest to terminate such lease and that three months' notice had been given before such termination. The argument is that the second proviso is merely declaratory and the third proviso supplies the machinery for giving effect to the provisions of the second proviso. According to the argument the third proviso is not an independent proviso but is a sort of proviso to the second proviso. In other words, the third proviso, according to learned counsel for the appellant, merely enables the Government to exercise the right conferred on it by the second proviso and, therefore, the Government, if it intends to avail itself of the right under the second proviso, must comply with the conditions laid down in the third proviso. It is said that the words "such rights" in the third proviso relate to the rights mentioned in the second proviso, that is to say, rights created on or after July 1, 1945. The scheme of section 20 of the Abolition Act is said to be, to provide, firstly that rights created by way of lease or otherwise by the landholder prior to the notified date should be deemed to be valid and all rights and obligations arising thereunder on or after the notified date should be enforceable by or against the Government. We start with this broad proposition. Then we come to the provisos. We may omit the first proviso, for it has no application to the facts of this case. The implications of the second proviso, learned counsel for the appellant points out, are two-fold, namely, (*a*) that all rights created before the notified date but after July 1, 1945, for a period not exceeding one year would be valid and enforceable both by and against the Government by the operation of the body of sub-section (1) itself and (*b*) that rights created before the notified date but after July 1, 1945, for a period exceeding one year would also be valid and enforceable by the Government against the person in whose favour such right had been created by reason of section 20 (1). Then we have the express provision of the second proviso, namely, that rights created before the notified date but after July 1, 1945, for a period exceeding one year would not be enforceable against the Government. In other words, the true meaning of the second proviso is said to be that rights created after July 1, 1945, are only voidable at the instance of the Government and that that being the position, the Government must do some overt act to terminate the transaction. The machinery for such a termination, it is urged, is to be found in the third proviso and the conclusion is pressed upon us that such termination can be brought about only on the fulfilment of the conditions laid down in the third proviso. The final step in the argument is that the person whose rights are terminated under the third proviso which is the "foregoing proviso" referred to in sub-section (2) must, therefore, be entitled to compensation under sub-section (2). We are unable to accept this line of argument as correct.

The provision of section 20 of the Abolition Act has been considered and construed by a Bench of the Madras High Court. We may, with advantage, quote here a part of the views expressed by Venkatarama Ayyar, J., in delivering the judgment of that Bench in *A.M.S.S.V.M. & Co.* v. *The State of Madras*[1] :

> "The argument of the petitioners is that the words "such rights" in the third proviso have reference to the rights created after the 1st July, 1945, mentioned in the previous proviso and on that construction, the lease in favour of the petitioners could be terminated only in accordance with that proviso by giving three months' notice. But this is to read the third proviso as a proviso not to the section, but to the second proviso and there is no warrant in law for such a construction. The words "such rights" refer in the second proviso only to the right dealt with in the body of the section and those words, occurring in the third proviso, should also bear the same interpretation. That the third proviso does not govern the second proviso is also clear if the scope of the two provisos is examined. Under the second proviso, leases for a period exceeding one year and created after 1st July, 1945, are not enforceable against the Government. That is to say, the Government can elect to disaffirm them and they become, on such disaffirmance, viod. If the third proviso also applies to such leases, as the petitioners contend, then the lease can be terminated only if the Government is satis-

1. (1953) 2 M.L.J. 587 : I.L.R. (1953) Mad. 1175, 1195.

fied that it is in the public interest that it should be terminated and that further, in such cases, the lessee will also be entitled to compensation under section 20 (2). In other words, while under the second proviso the Government can terminate the lease at its option and unconditionally, under proviso (iii) that can be done only if it is in public interest and, in that event, on payment of compensation, and this repugnancy can be avoided only by construing them as referring to different subjects. Then again, there is in proviso (iii) an exception with reference to rights created over private lands ; there is nothing corresponding to it in the second proviso and that also shows that the scope of the two provisos is different. The true effect of the section can be stated in three propositions : (i) Rights validly created prior to 1st July, 1945, will be valid ; (ii) such rights, however, may be determined under the third proviso if it is in the public interest to do so and in such cases, compensation will be payable under section 20 (2) ; and (iii) rights created after 1st July, 1945, if they are for a period exceeding one year, are liable to be avoided under the second proviso. In this view, we are of opinion that the notice, dated 13th March, 1951, falls under the second proviso and is valid."

It is pointed out that the attention of the Madras High Court was not drawn to the rule framed by the Governor of Madras in exercise of powers conferred on him by section 67 (1) and (2) of the Abolition Act. That rule runs as follows :

"Rule

In the case of any right in any land created by a landholder on or after the 1st day of July, 1945, for a period exceeding one year and falling under the second proviso to section 20 (1) of the said Act, the authority to decide whether the right should be terminated or allowed to continue shall be the Board of Revenue. Any order passed by the Board of Revenue under this rule shall be subject to revision by the Government."

We do not think that the rule in any way impairs the correctness of the Madras decision. It will be noticed that that rule only indicates the authority who is to decide whether the right falling under the second proviso should be terminated or allowed to continue. It does not purport to lay down the manner in which such termination is to be brought about. In other words, that rule does not, in terms, attract the operation of the third proviso at all. Even if that rule has the effect contended for, it cannot, in our view, change the meaning of section 20 which we gather on a true construction thereof.

In our view the scheme of the Act is to render ineffective all rights created after July 1, 1945, for a period exceeding one year. In one view of the matter it may well be taken as meaning that the creation of rights after July 1, 1945, is, by the force of the second proviso itself, void as against the Government without any further necessity for any overt act to be done by the Government to avoid the same. In that sense the second proviso would be a self-contained provision and the aid of the third proviso would be wholly uncalled for. But assuming that the effect of the second proviso is to make the rights created after July 1, 1945, only voidable and not void, all that follows is that the Government must do something to avoid them. There is no warrant for saying that the avoidance must be under the terms of the third proviso. If the third proviso at all applied to rights created after July 1, 1945, then the second proviso would be otiose and need not have been enacted at all. In our opinion the third proviso deals with the termination of rights created before July 1, 1945. The second proviso makes rights created after July 1, 1945, unenforceable as against the Government. The reason for conferment of such an unconditional right on the Government is well known, for it was on that crucial date that the party which came into power later declared its intention to abolish all zemindaries and intermediary interest in land. The second proviso was enacted to nullify the creation of rights in anticipation of the impending legislation and hence it was made unconditional. If any condition was intended to be super-imposed on the right of the Government to terminate the rights created after July 1, 1945, one would have expected those conditions to be mentioned in the second proviso itself. In our opinion, there is no substance in the principal point urged by learned counsel appearing for the appellant before us.

It was somewhat faintly argued by learned counsel for the appellant that the Government should have allowed the appellant's application for the renewal of his lease under rule 47 of the Mineral Concession Rules of 1949. The argument is wholly untenable. That rule provides that a mining lease granted by a private person shall be subject to certain conditions therein specified. The first condition thus laid down is that the term of the lease should be renewed at the option of the lessee for one period not exceeding the duration of the original lease. The effect of this rule is,

as it were, to insert statutorily some new terms in the lease itself. In other words, this rule does not do anything more than add some terms to the lease. When, however, the lease is determined under the second proviso, these terms must also fall with it.

No other point has been urged before us and, for reasons stated above, we think that these appeals should be dismissed with costs and we order accordingly.

Appeals dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, M. HIDAYATULLAH AND K. C. DAS GUPTA, JJ.

Radha Prasad Singh .. *Appellant**

v.

Gajadhar Singh and Others .. *Respondents.*

Practice—Appeal—Finding of fact by Trial Court—Interference by Appellate Court—Principles.

When an appeal lies on facts it is the right and the duty of the Appellate Court to consider what its decision on the question of facts should be ; but in coming to its own decision it should bear in mind that it is looking at the printed record and has not the opportunity of seeing the witnesses and that it should not lightly reject the Trial Judges' conclusion that the evidence of a particular witness should be believed or should not be believed particularly when such conclusion is based on the observation of the demeanour of the witness in Court. But, this does not mean that merely because an Appeal Court has not heard or seen the witness it will in no case reverse the findings of a Trial Judge even on the question of credibility, if such question depends on a fair consideration of matters on record. When it appears to the Appeal Court, that important considerations bearing on the question of credibility have not been taken into account or properly weighed by the Trial Judge and such considerations including the question of probability of the story given by the witnesses clearly indicate that the view taken by the Trial Judge is wrong, the Appeal Court should have no hesitation in reversing the findings of the Trial Judge on such questions. Where the question is not of credibility based entirely on the demeanour of witnesses observed in Court but a question of inference of one fact from proved primary fact the Court of Appeal is in as good a position as the Trial Judge and is free to reverse the findings if it thinks that the inference made by the Trial Judge is not justified.

Appeal from the Judgment and Decree, dated the 8th April, 1949, of the Patna High Court, in Appeal from Original Decree No. 116 of 1947, arising out of the Judgment and Decree, dated the 28th February, 1947, of the Sub-Judge at Begusarai, in Title Suit No. 14/14 of 1944/45.

L. K. Jha, Senior Advocate, (*B. K. Sinha*, Advocate, with him), for Appellant.

G. S. Pathak and *B. Sen*, Senior Advocates, (*B. K. Saran* and *R. C. Prasad*, Advocates, with them), for Respondent No. 1.

S. D. Sekhri, Advocate, for Respondents Nos. 3 and 4.

The Judgment of the Court was delivered by

Das Gupta, J.—Though a number of questions, some of fact and some of law were originally raised in this suit for pre-emption, the main question for consideration in this appeal from the judgment of the High Court of Patna reversing the decree or pre-emption granted by the Trial Court, the Subordinate Judge of Monghyr, is the question on which the High Court based its decision of reversal. That question is whether the ceremonies essential for exercising the right of pre-emption were properly performed. Issue No. 9 in which this question was raised is in these words :—

" Did the plaintiff perform the ceremonies of Talab-E-Mowasibat and Talab-E-Ishtashad as required by law ? "

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* C.A. No. 19 of 1954. 7th September, 1959.

The plaintiff Radha Prasad Singh brought this suit for pre-emption in respect of 5 items of property described in Schedule B of the plaint which along with certain other properties were sold by the defendant 2nd Party Mst. Jogeshwari Kumari *alias* Jogeshwari Kumari widow of Babu Ganga Prasad Singh deceased and daughter of Babu Narsingh Prasad Singh by a deed executed on November 18, 1943, at Moghra and registered on November 23, 1943, at Monghyr.

The Trial Court held that the plaintiff had failed to prove that he was a co-sharer in respect of Item 2 of Schedule B. As regards the other 4 items of properties he held that the plaintiff was a co-sharer and as already indicated he gave the plaintiff a decree for pre-emption in respect of these 4 Items.

The sale-deed is in favour of the defendant first party, Gajadhar Singh. It is no longer disputed, however, that Gajadhar Singh was a mere benamidar and the real purchaser by this deed was Babu Lakshmi Prasad Singh, his son Satya Narain Singh and others.

A dispute was raised as to whether 4 annas 5 gandas odd share of Mauza, Majhaul Kilan Shri Ram was sold or the entire 8 annas odd share of the vendor was sold. It has been held by both the Courts below that the plaintiff's original case that the 4 annas 5 gandas odd share of Majhaul Kilan Shri Ram was sold is not correct and that really 8 annas odd share, the entire interest of the vendor in this property was sold by the deed, but that after the registration of the sale-deed it was tampered with and by an act of forgery the 8 annas odd share was altered fraudulently to 4 annas 5 gandas. It was after the defendant's pleading in the written-statement that 8 annas odd gandas of this Mauza was sold and not 4 annas odd gandas as mentioned in Schedule B, that the plaintiff prayed for and obtained an amendment of the plaint by which an alternative prayer for pre-emption in respect of 8 annas odd share of this Mauza was made. But for this amendment it is obvious the prayer for pre-emption could not be granted as being only for a partial pre-emption, once it has been found that 8 annas odd gandas were sold and not 4 annas odd gandas. One question which was therefore raised was whether the amendment was rightly granted by the Trial Court. The question that the suit as brought was for partial pre-emption was also raised from another aspect, *viz.*, that though the sale of this Mauza, Majhaul Kilan Shri Ram was of all villages Asli Mai Dakhili, *i.e.*, original with dependencies, there is no prayer for pre-emption in this suit in respect of Dakhili villages. As already indicated, however, the main question in controversy was whether the essential ceremonies required in law, *i.e.*, Talab-E-Mowashibat and Talab-E-Ishtshad were performed in accordance with law.

As regards this the plaintiff's case is that he came to know of this sale by his co-sharer Jogeshwari for the first time on January 2, 1944, at about 11 A.M. when Jadunath Singh, a resident of Majhaul informed him of this and that he at once completed formality of Talb-E-Mowashibat in the presence of some persons and that shortly after this he went to the properties of Tauzis 1130, 4201, and 1136, and also Mauza Buzurgabad and performed Talab-E-Ishtshad ; that he went then to the residence of the purchaser Gajadhar Singh at Matihani on January 3, 1944, and again performed the Talab-E-Ishtashad ; and that that very day he started for the residence of the vendor and performed the Talab-E-Ishtashad there on January 4, 1944.

The defence was that the story of any such ceremonies having been performed is wholly untrue and that, in fact, the plaintiff had knowledge of the sale from long before January 2, 1944, he having been a rival bidder for the purchase of these very properties. A detailed story of a proclamation by beat of drums of the proposed sale by Bindeshwari and the plaintiff's attempt to secure the property at the sale was set out by the defendant in the written statement and was sought to be proved by his witnesses. The Trial Court disbelieved the defendant's story on this point. He also rejected the defence allegation that the plaintiff was himself responsible for the forgery that was committed in respect of the deed of sale by altering the statement of the share in Majhaul Kilan Shri Ram that was sold, from 8 annas odd gandas to 4 annas odd gandas. On these findings he held the plaintiff's suit was not barred by estoppel.

Proceeding then to the consideration of the question whether the plaintiff came to know of the sale in favour of the first defendant for the first time on January 2, 1944, from Jadunath as alleged, the learned Judge has accepted the evidence given by the plaintiff and Jadunath on this point and held that the plaintiff's case that he received information for the first time on that day was true. He also accepted the evidence of the plaintiff as regards the requisite ceremonies having been duly performed.

The very important question that arose for the decision of the Court was whether the plaintiff's story that he came to know of the sale for the first time from Jadunath on January 2, 1944, is true. The Trial Court held that it was true. On this point the High Court came to a contrary conclusion. The learned Judges of the High Court were of opinion that the evidence of witness Jadunath was wholly unacceptable and that the plaintiff's evidence that he came to know of the alleged sale on January 2 1944, could not be accepted. After pointing out that the whole basis of the plaintiff's claim that he performed the ceremonies of Talab-E-Mowashibat and Talab-E-Ishtshad was without substance, they examined the evidence as regards the performance of the ceremonies and held that this evidence was also not acceptable.

The question in dispute before us is thus a pure question of fact, *viz.*, whether the plaintiff came to know of the sale for the first time on January 2, 1944, and thereupon performed the ceremonies of Talab-E-Mowashibat and Talab-E-Ishtashad. The main contention raised by Mr. Jha, who appeared in support of the appeal is that in considering this question of fact, the High Court approached the question from a wrong point altogether and was not justified in reversing the judgment of the Trial Court on that point.

The question as to what should be the right approach for a Court of Appeal in deciding a question of fact already decided in one way by the Judge in the Court of the first instance has often engaged the attention of the Courts, though the views expressed have not been uniform. Emphasis has been laid in some cases on the importance of the Court of Appeal deciding for itself the question of fact when the appeal is on facts, though remembering that it should not lightly do so not having had the advantage which the Trial Judge had of seeing the witnesses. More emphasis has been laid in other cases on the importance of not reversing the Trial Judge's findings of fact without compelling reasons. All the Courts in all the cases have stressed the rule which the Courts of Appeal should observe for themselves : that a Judge sitting on appeal not having had the opportunity of seeing and hearing the witnesses should think twice and more than twice before reversing the findings of fact arrived at by the Trial Court who has had that opportunity. To say that however is not to say that the Court of Appeal will never reverse a finding of fact of the Trial Court. In *Shunmugaroya Mudaliar* v. *Manikka Mudaliar*[1], Lord Collins pointed out that :

> " It is always difficult for Judges who have not seen and heard the witnesses to refuse to adopt the conclusions of fact of those who have ; but that difficulty is greatly aggravated where the Judge who heard them has formed the opinion, not only that their inferences are unsound on the balance of probability against their story, but they are not witnesss of truth."

In the same Judgment Lord Collins referred approvingly to the judgment delivered by Lindley, Master of the Rolls, in the Court of Appeal in the case of *Coghlag* v. *Cumberland*[2] which set out the limitations of the rule :

> " Even where the appeal turns on a question of fact, the Court of Appeal has to bear in mind that ts duty is to rehear the case, and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions ; and when the question arises which witness is to be believed rather than

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1. (1909) 19 M.L.J. 640 ; L.R. 36 I.A. 185 : I.L.R. 32 Mad. 400 (P.C.).
2. L.R. (1898) 1 Ch. 704.

another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not ; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen ".

Almost the same view as expressed by Lord Thankerton in *Watt (or Thomas)* v. *Thomas*.[1]

" I. Where a question of fact has been tried by a Judge without a jury and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the Trial Judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial Judge's conclusions. II. The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. III. The appellate Court, either because the reasons given by the Trial Judge are not satisfastory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

These observations were cited with approval by Lord Reid in *Benmax* v. *Austin Motor Co. Ltd*[2]. (See also the observations of Mukerjee, J., in *Laljee Mahomed* v. *Girlder*[3]).

This question of the proper approach of the Court of Appeal to decisions on questions of fact arrived at by the Trial Court was considered by this Court in *Sarju Pershad* v. *Raja Jwaleshwari Pratap Narain Singh*[4]. Mukherjea, J., while delivering the judgment of the Court observed :—

" In such cases, the appellate Court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in Court. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is—and it is nothing more than a rule of practice—that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the Trial Judge on a question of fact."

The position in law, in our opinion, is that when an appeal lies on facts it is the right and the duty of the Appeal Court to consider what its decision on the question of facts should be ; but in coming to its own decision it should bear in mind that it is looking at the printed record and has not the opportunity of seeing the witnesses and that it should not lightly reject the Trial Judge's conclusion that the evidence of a particular witness should be believed or should not be believed particularly when such conclusion is based on the observation of the demeanour of the witness in Court. But, this does not mean that merely because an Appeal Court has not heard or seen the witness it will in no case reverse the findings of a Trial Judge even on the question of credibility, if such question depends on a fair consideration of matters on record. When it appears to the Appeal Court that important considerations bearing on the question of credibility have not been taken into account or properly weighed by the Trial Judge and such considerations including the question of probability of the story given by the witnesses clearly indicate that the view taken by the Trial Judge is wrong, the Appeal Court should have no hesitation in reversing the findings of the Trial Judge on such questions. Where the question is not of credibility based entirely on the demeanour of witnesses observed in Court but a question of inference of one fact from proved primary facts the Court of Appeal is in as good a position as the Trial Judge and is free to reverse the findings if it thinks that the inference made by the Trial Judge is not justified.

Turning now to the instant case we find that the Trial Judge having seen and heard Jadunath and the plaintiff, believed their evidence on the point of information

1. (1947) 1 All E.R. 581, 587.
2. (1955) 1 All E.R. 326.
3. (1915) I.L.R. 43 Cal. 833.
4. (1950) S.C.J. 583 : 1950 S.C.R. 781, 784.

being given to the plaintiff by Jadunath about the sale on January 2, 1944, at about 11 A.M. It does not, however, appear that the learned Trial Judge arrived at his conclusion on the basis of the demeanour of these witnesses having created a favourable impression on his mind as to their credibility.

In scrutinising the evidence of the plaintiff and of Jadunath it must be borne in mind that the case of the plaintiff is that on January 2, 1944, certain information having been received by him, he performed the formalities. There is no case that the formalities were performed on any other date. Therefore, if the story of the communication of information on January 2, 1944, is not established then the whole case of the plaintiff must fail.

Jadunath's evidence on this point was :—

"On 2nd January, 1944, I told Radha Babu at his house in Manjhaul that Maghrawalli Jugeshwari Kumari had sold away her Milkiat to Gajadhar Rai of Motihani, this was about 11 A.M. Radha was startled to hear this and standing up said :—

"Jo jo jaidad Babu Gajadhar Singh hath (then says) Maghrawalli Mussammat Jageshwari Kumari ne jo jo jaidad Babu Gajadhar Singh ke hath becha hai uske kharidne ka haq merà. Ham Kharida, Ham Kharida, Ham Kharida. Talab Mowasibat karte hain. Babu Jagdamba Prasad aur Babu Narayan Prasad gabah rahie................I came to know from a man of Chitral, 1 kos from Matihani that Gajadhar had a marriageable grandson."

Mention should be made in this connection also of the evidence of Jagdambi Prasad :—

" On 2nd January, 1944, I had been to plaintiff's house at 10-30 A.M. Babu Narayan Prasad Singh, a pleader of Samastipur was at plaintiff's house at the time........Jadhunath Singh told Radha Prasad that Musammat Jageswari Kumari of Maghra had sold away her property in Manjhaul to Gajadhar Singh of Matihani. As soon as Jadunath Singh said this Radha Prasad Singh was startled stood up and said :

I have a right to purchase this property. I have purchased ; I have purchased ; I have purchased. You Jagdamba Prasad Singh, you Narayan Prasad Singh and you Jadunath Singh, bear witness to this fact. He uttered these words thrice."

In deciding the question whether the information from Jadunath was the first information received by the plaintiff the Trial Judge had necessarily to consider whether the story that Jadunath came to know of the sale and brought this information on to the plaintiff on January 2, 1944, at about 11 A.M. was true or not. In arriving at a decision on the point it was necessary for him to consider the probabilities of the story, of Jadunath having gone to Gajadhar's house in search of a bride-groom and that there Gajadhar Singh informed him of the sale and then of the probability of the story that he would be taking upon himself the task of going to the plaintiff's house immediately on return to his village to convey this information, the probability of the story as to how the plaintiff reacted to the account and also the question of discrepancy. It does not appear that the learned Trial Judge took any of these matters into consideration. All that he says about Jadunath's credibility is that his evidence had been criticised on the ground that he was one of plaintiff's witnesses in the previous suit brought by him against Satya Narain Singh's ancestors and that in his opinion was not a valid ground for discarding the evidence of Jadunath Singh. We agree with the learned Judge that the mere fact that Jadunath was one of the plaintiff's witnesses in the previous suit brought by him against Satya Narain Singh's ancestors about 33 years ago would not by itself be a valid reason for discarding his testimony. The fact that this was not a valid reason for discarding his testimony does not, however, absolve the Court of the duty of testing the witness's testimony on the touch-stone of probability. The learned Judges of the High Court applied that touch-stone and came to the conclusion that Jadunath was not a witness of truth.

It is clearly a case where the words used by Lord Thankerton that the Trial Judge had not taken proper advantage of his having seen and heard the witnesses, and the matter would become at large for the appellate Court should apply. Here was a witness who could not be considered to be wholly independent. For, on his own showing he took the trouble of going to plaintiff's house after what may be taken

to be an arduous journey in an unsuccessful search for a bride-groom, to inform the plaintiff of a matter in which he himself had no interest—a witness who had figured, though many years ago, in a pre-emption suit brought by the same person. These facts made close scrutiny of the witness's account necessary before the Judge could say just by looking at him that he was a witness of truth. That scrutiny is conspicuous by its absence. Taking his evidence as a whole we find that his story that after coming to know of the sale in question he went to the house of Gajadhar, the first defendant, at village Matihani to make enquiries about a marriage proposal in respect of his daughter with his grandson and that it was in that connection that Gajadhar spoke to him about his purchase. But it is curious that in his examination in chief this witness came straight to his account of coming to the plaintiff's house on January 2, 1944, and informing him about the sale by Jogeshwari of her Milkiat to Gajadhar without saying a word as to his visit to Gajadhar's house, to the purpose of his visit and the manner in which Gajadhar gave him the information or even the detailed nature of the information. It was in cross-examination that he disclosed that he went to Gajadhar's house for "barthuari". It is in vain that we look into his evidence, whether in examination in chief or in cross-examination, for the exact information given by Gajadhar.

It has to be remembered in this connection that it is no longer disputed that Gajadhar himself had no interest in these properties and was a mere benamidar. Even if Gajadhar's own account that he was completely in the dark about these transactions be left out of account it was necessary for the Court to consider how far it was probable that Gajadhar would put on Jadunath a false story of purchase by himself of properties. It was urged that this Gajadhar did with a view to raise the Tilak which he could thus obtain. Jadunath himself has not said anything about the negotiations about Tilak but one Mahabir Ray has said that when he was going to the fields Gajadhar called him and there he heard Gajadhar demanding a higher Tilak stating that he had recently purchased properties at Majhaul from Mussammat. Jadunath himself does not mention having seen this Mahabir at Gajadhar's house. Jadunath claims to have gone to his house with a servant. Mahabir has not mentioned the presence of this servant. The question whether a man like Mahabir who was a total stranger to the plaintiff would be called by Gajadhar to hear such talks also requires the serious consideration of the Court. The Trial Judge does not appear to have given the slightest consideration to this aspect of the matter. The learned Judges of the High Court thought that there was no reason that Gajadhar would go out of his way to convey the information to Jadunath that he had purchased the Milkiat of Jogeshwari, the defendant No. 2. It is difficult not to agree to this estimate of probability.

Even more important was the question of probability as regards the story of the plaintiff's reaction when the information is said to have been given to him. Both Jadunath and Jagdambi say that the plaintiff was startled on getting information of the sale and at once uttered the words which have been set out already of the Table-E-Mowashibat. What would a man of ordinary prudence—not to speak of the man of property and with experience of previous litigation like the plaintiff—would do under such circumstances? There cannot be any two opinions on this question. He may consider it unwise to ask his informant any further question before making the first Talab, *i.e.*, Talab-E-Mowasibat. Once that was completed he would ply his informant with questions as to where he got this information, what the information exactly was, what properties had been sold, what the consideration was, and other connected questions. In this case, according to the evidence of Jadunath no such questions were asked by the plaintiff. In his examination-in-chief Jadunath says :—

"He (plaintiff) asked his syce to bring his tandom. He told Jagdamba Babu that he would go to make talab-e-isthashad and asked him to accompany him. While they were boarding the tandom Jai Prakash Narayan came that way. Radha Babu asked him also to accompany him. The same night Radha Babu met me at my house at 8 P.M. He asked me where I had obtained the information about the sale."

From this evidence it is clear that though Jadunath was at the place until the tandom had been brought and the plaintiff and Jagdamba got into the tandom and Jai Prakash Narayan also arrived, no question was put by the plaintiff to Jadunath in this behalf. It has to be noted that the plaintiff went to Jadunath's house the same night at 8 P.M. and the only question which was asked was : Where he had obtained the information about the sale and nothing was asked about what properties had been sold or for how much had they been sold. In cross-examination Jadunath made the further statement in these words :—

> "When I broke the news Radha Prasad did not ask me where I had received the information, or who had purchased the properties ; what properties had been purchased or what the consideration was."

Such conduct on the part of Jadunath is incredible and any Judge of facts with experience of normal human conduct could have no hesitation in coming to the conclusion that things could not have happened in the way Jadunath has described. Mr. Jha, the learned counsel for the appellant, urged that it would be unfair to base any conclusion on the supposed improbability or unnaturalness of such silence on the part of the plaintiff without having given him an opportunity to explain why he acted in this peculiar manner. It has to be noticed, however, that Jadunath had been examined and cross-examined on January 9, 1947, and when the plaintiff was put in the witness-box on the following day, *i.e.*, January 10, 1947, the lawyer who examined him had before him the fact that Jadunath's evidence had brought out this strange silence on the part of the plaintiff after he had been informed of the sale. It was his duty to obtain from Radha Prasad an explanation of such conduct. But he put no questions to Radha Prasad about this. The obvious reason is that Radha Prasad had no explanation to offer and the lawyer knowing this kept quiet. It appears to us that the learned Judges of the High Court of Patna were right in attaching great importance to this conduct of the plaintiff and were justified when they thought that this was an improbable story and rejected, in disagreement with the Trial Court, Jadunath's evidence altogether.

Mention has to be made of another circumstance which was noticed in the High Court judgment. That is as regards the exact information which is said to have been given by Jadunath. Jadunath's own account in the examination-in-chief is that he

> "told Radha Babu at his house in Majhaul that Maghrawalli Jugeshwari Kumari had sold away her Milkiat to Gajadhar Rai of Motihani ".

In his cross-examination he first said :—

> "The information I gave was in these terms : 'Maghrawalli Musammat apni jaidad Babu Gajadhar Singh Motihani wale ke chan bech dia.' And then correcting himeslf said 'Babu Gajadhar Singh ne kaha ki Maghrawali Mussammat ki jaidad kharid kia.' "

It is not possible for anybody to remember exactly the words used by himself many years ago and it is reasonable to say that there was no substantial difference between the account given by him of this matter in his examination-in-chief and in cross-examination. It is interesting to remember, however, that in paragraph 4 of the plaint, it was stated that the information that Jadunath gave was :

> "That the defendants, 2nd and 3rd parties, had sold the properties entered in Schedule B of this Plaint, along with other properties to the defendant, 1st party, under a registered deed of sale."

According to Jadunath's evidence he does not appear to have mentioned the defendant 3rd parties as the sellers nor gave any details to show that the properties entered in Schedule B were covered by the sale nor that there was a registered deed of sale.

Turning to the evidence of the plaintiff and Jagdamba as regards the information said to have been given by Jadunath we find that Jagdamba says :

> "Jadunath Singh told Radha Prasad that Musammat Jogeshwari Kumari of Maghra had old away her property in Mahjaul to Gajadhar Singh of Motihani ".

According to the plaintiff himself the information which Jadunath gave was that Gajadhar Singh had purchased the Majhaul properties from the Maghrawali Musammat. An examination of Schedule-B shows that while the first 3 items were properties in mauza Majhaul, the 4th item is a property in Buzurgabad while the 5th item is a property in mauza Dundit. There appears to be no reason to think that these properties 4 and 5 could be even loosely considered to be properties in Majhaul or Majhaul properties. Commenting on Jagdamba's evidence on this point Mr. Justice Sinha, who delivered the leading judgment, stated :—

> " Plaintiff's witness No. 2 has stated that Jadunath told the plaintiff that the second defendant had sold her property in Majhaul to the first defendant. If that is so, it is a little difficult to understand how they went to Buzurgabad or to the other items of property to perform the ceremonies, if they ever did so."

It is strange that there should be such discrepancy between the evidence of Jadunath himself and the plaintiff and Jagdamba as to what actually was said. But if Jagdambi's account such as is supported by the plaintiff himself, is true then there is no acceptable explanation as to why the plaintiff could think of going to Buzurgabad at all as he and his witnesses say, he did.

It was the duty of the trial Judge to take into account these several considerations in testing the credibility of the account given by Jadunath, the plaintiff and Jagdambi that Jadunath informed the plaintiff on January 2, 1944, about the sale. He did not do so. The learned Judges of the High Court as a Court of Appeal were in duty bound to consider these questions before accepting the decisions of the learned trial Judge. The criticism that the approach of the learned Judges of the High Court was wrong is therefore wholly without foundation. The learned Judges of the High Court rightly took these matters into consideration and the decision they arrived at on these considerations that the trial Judge's assessment of the evidence was wrong and that Jadunath was not a witness of truth and that the account given by the plaintiff that the information was conveyed to him by Jadunath on January 2, 1944, should not be accepted is clearly right.

Once this decision is reached it is unnecessary to consider the further question whether any ceremonies were performed at all on 2nd, 3rd or 4th January, 1944, as stated by the plaintiff and his witnesses. Even if they were, they would be of no assistance to the plaintiff as the plaintiff has failed to show that it was on January 2, 1944, that he received the information about the same.

It is unnecessary for us therefore to decide the further question that appears to have been raised, *viz.*, that even if the evidence as regards the performance of the two Talabs, *i.e.*, Talab-E-Mowashiba and Talab-E-Ishtshad is accepted at its face value the requirements of the law have not been fulfilled. The High Court held that the plaintiff had failed to prove that the words used by him at the time of the making of the second demand of Talab-E-Ishtshad were sufficient to draw the attention of the witnesses to the specific properties in respect of which he was demanding his right of pre-emption. We express no opinion whether this view of the learned Judges of the High Court is correct or not. We also express no opinion on the two other questions, *viz.*, whether the trial Court acted in accordance with law in granting leave to the plaintiff to amend his plaint so as to include the alternative prayer for pre-emption in respect of 8 annas odd share of Tausa No. 1130 instead of 4 annas odd share as originally claimed and also whether the suit was bound to fail because there was no prayer for pre-emption for the Dakhili villages of Tausa No. 1130.

In our opinion the plaintiff having failed to prove that the information of the sale was conveyed to him by Jadunath on January 2, 1944, the suit was rightly dismissed by the High Court. This appeal is, therefore, also dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, A. K. SARKAR AND K. SUBBA RAO, JJ.

Rm. Nl. Ramaswami Chettiar and others .. *Appellants**

v.

The Official Receiver, Ramanathapuram at Madurai .. *Respondent.*

Limitation Act (IX of 1908), *Article* 182 (5)—*Application for execution of decree by Official Receiver under Provincial Insolvency Act (V of* 1920)—*Previous application by transferee of decree in fraud of creditors—If one made in accordance with law and gives fresh starting point.*

Assuming that when an order is made under section 54 of the Provincial Insolvency Act annulling a transfer, the transfer stands annulled as from the date it was made, still the transfer stands till it is annulled and therefore, till then the transferee has all the rights in the property transferred. So long as the transferee has such rights he was competent to exercise them and such exercise would be legal and fully in accordance with law. The fact, if it be so, that the transfer on annulment, becomes void as from the date of the transfer cannot turn the exercise of right under the transfer, made prior to the annulment and which was legal when made, illegal. Applications for execution by such transferee of a decree were therefore fully in accordance with law when they had been made and that is all that Article 182 of the Limitation Act requires.

Sub-sections (2) and (7) of section 28 of the Provincial Insolvency Act cannot have the effect of vesting the decree in the Receiver till the tansfer had been annulled.

It cannot be said that an order of adjudication founded on an act of insolvency constituted by a transfer of property amounting to a fraudulent preference, itself and without more annuls that transfer.

Appeal by Special Leave from the Judgment and Order, dated the 6th December, 1950, of the Madras High Court in C.M.A. No. 332 of 1945 arising out of the Judgment and Order, dated the 17th January, 1945, of the Subordinate Judge, Devakottai, in E.P. No. 90 of 1944 in O.S. No. 14 of 1926.

M. S. K. Iyengar, Advocate, for Appellants.

A. V. Viswanatha Sastri, Senior Advocate (*T. R. V. Sastri*, Advocate, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Sarkar, J (on behalf of himself and *S. K. Das, J.*)—This appeal arises out of an application for execution of a decree for money and the only question is whether the application was made within the time prescribed by the Limitation Act.

The decree was passed in favour of one Venkatachalam Chettiar on May 9, 1935, against the appellants and certain other persons. On February 3, 1936, Venkatachalam Chettiar transferred the decree to his mother, Meenakshi Achi, by an assignment in writing never having tried to execute it himself. Soon thereafter, namely, on March 26, 1936, a creditor of Venkatachalam Chettiar presented a petition under the Provincial Insolvency Act (hereinafter referred to as the Act) for adjudicating him an insolvent on the ground that the transfer of the decree to Meenakshi Achi was a fraudulent preference and as such an act of insolvency. This petition remained pending for a considerable time and ultimately on January 7, 1939, an order was made on it adjudicating Venkatachalam Chettiar an insolvent. By that order respondent No. 1, the Official Receiver of Ramanathapuram, was appointed the receiver in insolvency and the insolvent's estate vested in him. This order was based on the finding that the transfer of the decree by Venkatachalam Chettiar to Meenakshi Achi was a fraudulent preference and an act of insolvency. On January 26, 1942, the Receiver made an application in the insolvency proceedings for an order annulling the transfer of the decree by the insolvent to Meenakshi Achi, and on this application an order was made on April 9, 1943, under section 54 of the Act annulling that transfer.

In the meantime, Meenakshi Achi had made two applications for execution of the decree as the assignee of it and a reference to them is necessary. The first

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* C.A. No. 207 of 1955. 28th August, 1959.

of these applications was made on December 14, 1936, for an order recognising her as the assignee of the decree and for its execution against some of the judgment-debtors. This application was disposed of by an order made on September 27, 1937, recognising her right to execute the decree as the assignee and directing a certain compromise made presumably with the judgment-debtors concerned, to be recorded. The terms of this compromise are not relevant for the purpose of the appeal. Thereafter, on August 2, 1940, Meenakshi Achi as the assignee of the decree made another application for its execution, and this application was disposed of by an order made on September 30, 1940, dismissing it for default of prosecution. It will be remembered that it was after these applications and the orders thereon had been made that the order annulling the assignment of the decree to Meenakshi Achi was passed.

After the order annulling the transfer of the decree to Meenakshi Achi had been made, the Receiver considering himself then entitled to the decree, made an application for its execution on September 27, 1943. It is this application which has given rise to the present appeal.

The executing Court dismissed the application as having been made beyond the time prescribed by the Limitation Act. On appeal, the High Court at Madras set aside the order of the executing Court and held that the application was within time. Some of the judgment-debtors have now come up in appeal to this Court. The appeal is contested by the Receiver, the respondent No. 1. The other respondents among whom are the remaining judgment-debtors or their successors in interest, have not appeared.

Applications for execution like the present one are governed by Article 182 of the Limitation Act. That article provides a period of three years within which the application must be made. The article prescribes different points of time for different cases from which the period is to commence running. The first point of time so prescribed is the date of the decree. The fifth point of time prescribed is expressed in these words :

"(Where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court for execution........"

The question for determination is whether the fifth point of time applies to the Receiver's application for execution. If it does not, the application must be held to have been made out of time, while if it does, the application would not be barred by limitation.

The Receiver contends that the two applications by Meenakshi Achi were "applications made in accordance with law to the proper Court for execution" within the meaning of the article and his application was within time as it had been made within three years of the date on which the final order on Meenakshi Achi's last application was made.

It is said on behalf of the appellants that in view of the orders in the insolvency proceedings it must be held that she was not entitled to the decree on any of the dates on which she applied for its execution and that her applications were therefore incompetent and not in accordance with law.

The appellants put their contention in several ways. It is first said that the order annulling the assignment of the decree to Meenakshi Achi related back to the date of the assignment with the result it has to be deemed as if she had never been entitled to the decree and that, therefore, the applications for execution by her were not competent and hence were not in accordance with law.

We think this contention is wholly unfounded. We will assume for the purpose of the present case that when an order is made under section 54 of the Act annulling a transfer, the transfer stands annulled as from the date it was made. But even so, the transfer stands till it is annulled and therefore, till then, the transferee has all the rights in the property transferred. So long as the transferee had such rights he was competent to exercise them and such exercise would be legal and fully in accordance

with law. The fact, if it be so, that the transfer on annulment, becomes void as from the date of the transfer cannot turn the exercise of a right under the transfer, made prior to the annulment and which was legal when made, illegal. Meenakshi Achi had hence full legal competence to execute the decree, till the transfer of it to her was annulled. Her two applications for execution of the decree were therefore fully in accordance with law when they had been made and that is all that Article 182 requires.

Next, it is said that the provisions of sub-sections (2) and (7) of section 28 of the Act make Meenakshi Achi's two applications for execution incompetent in law. These provisions have now to be considered. Sub-section (2) says that upon the making of an order of adjudication the whole of the property of the insolvent shall vest in the receiver and sub-section (7) says that an order of adjudication shall relate back to and take effect from the date of the presentation of the petition on which it is made. It is said that under these provisions, the assets of the insolvent in this case, including the decree under execution, became vested in the Receiver on March 26, 1936, when the petition for adjudicating him an insolvent had been presented, and consequently, the two applications for execution by Meenakshi Achi which had been made after that date were incompetent and not in accordance with law.

It seems to us that this contention also is fallacious. These sub-sections cannot have the effect of vesting the decree in the Receiver till its transfer to Meenakshi Achi had been annulled. Till then it was not a part of the insolvent's estate. The annulment, as we have earlier pointed out, was made under section 54 of the Act. That section provides that certain transfers of property by the insolvent would be deemed fraudulent and void as against the receiver in insolvency and shall be annulled by Court. It is obvious that a transfer liable to be annulled under this section remains a perfectly valid transfer till it is annulled. If it had become void automatically on an order for adjudication being made, there would be no need to provide for its annulment by Court. It would follow that Meenakshi Achi was legally possessed of the decree and competent to apply for its execution till the transfer of the decree to her was annulled under section 54.

It is then said that though it may generally be that a transfer liable to be annulled under section 54 remains valid till it is annulled, that is not so where the transfer is the act of insolvency upon which the order of adjudication is founded, for, in such a case the order itself annuls the transfer. So, it is said that as the order of adjudication in this case was founded upon the transfer of the decree to Meenakshi Achi, that transfer became annulled on the order being made on January 7, 1939, and the second application for execution by Meenakshi Achi was incompetent. It is true that if this is the correct view, then the receiver's application for execution must be held to have been made beyond the time allowed, for, it had been made more than three years after the final order on the first application for execution by Meenakshi which is the only order on which the Receiver can on this basis rely for resorting to the fifth point of time fixed by Article 182.

Now this argument is based solely on the decision of the Judicial Committee in *Mahomad Siddique Yousuf* v. *Official Assignee of Calcutta*[1], which it is said held that where a transfer is the act of insolvency on which the order of adjudication is founded, that order itself has the effect of annulling the transfer.

We think this case has been misunderstood. We find nothing in it to lead to the view that an order of adjudication founded on an act of insolvency constituted by a transfer of property amounting to a fraudulent preference, itself and without more annuls that transfer. That was a case decided under the Presidency-towns Insolvency Act. In that case one of the acts of insolvency on which the order of adjudication had been founded was a transfer by the insolvent of a certain decree in his favour to the appellant, which was held to have been a fraudulent preference. The transferee was not a party to the order of adjudication. The Official Assignee, that is,

1. (1943) 2 M.L.J. 160 : L.R. 70 I.A. 93 (P.C.).

the Receiver in insolvency, applied to have that transfer annulled. It was contended on behalf of the Official Assignee before the Judge in insolvency in the High Court that the order of adjudication holding the transfer to be a fraudulent preference was conclusive and binding on the transferee though he was not a party to the insolvency petition. It was said that that had been held in *Ex parte Learoyd*[1], which turned on the English Bankruptcy Act, 1869, the terms of which were similar to the relevant provisions in the Presidency-towns Insolvency Act. The learned Judge felt some difficulty in view of a decision of the Madras High Court to which it is unnecessary to refer, whether the principle of the English decision applied to a case under the Presidency-towns Insolvency Act. He, therefore, went into the facts and came to the conclusion that the transfer amounted to a fraudulent preference and thereupon made an order annulling it. On appeal the appellate Judges of the High Court

> " expressed some doubt whether the intent to prefer was in fact proved; but they were both of opinion (following *Ex parte Learoyd*[1]), that the order of adjudication was conclusive and could not be disputed."

They held that this was so though the transferee was not a party to the order of adjudication. In that view of the matter the appellate Judges felt that there was a decision binding on the transferee that the transfer was void as a fraudulent preference and they thereupon annulled the transfer as a matter of course. The judgment in the High Court are reported in 45 C.W.N. 441. The transferee who was not a party to the insolvency petition, then asked for an extension of time to prefer an appeal from the order of adjudication but this was refused.

Then the matter was taken up to the Judicial Committee in further appeal. The Judicial Committee held that the appellate Judges of the High Court were right in their view that the principle of *Ex parte Learoyd*[1], applied to cases under the Presidency-towns Insolvency Act, but they thought that in the circumstances of the case the order of the appellate Judges refusing to extend time for the transferee to appeal from the order of adjudication was not justified and set it aside and extended the time to appeal. In order however to make the order in the contemplated appeal should it succeed, effective, they also set aside the order annulling the transfer though in their view it was " plainly right ". This would appear from their observations at page 99 of the report :

> " It is plain that an appeal against the adjudication order would be useless while the orders stand in this independent proceeding declaring the transfer void because of the adjudication order itself. On the other hand, the decision of the High Court avoiding the transfer is plainly right while the adjudication order stands and the appellant as a condition of the extension of time must pay, as he has offered to do, the costs thrown away."

And at page 100 they said :

> " The order is without prejudice to the right of the Official Assignee, if he is so advised, to make a further application to have the transfer declared void."

It is therefore abundantly clear that all that the Judicial Committee held in *Mohamed Siddique Yousuf's case*[2], was that in a case under the Presidency-towns Insolvency Act, when the act of insolvency upon which an order of adjudication is founded is a transfer amounting to a fraudulent preference, the transferee cannot so long as the order of adjudication stands, question that finding, namely, that the transfer was a fraudulent preference and that, therefore, in an application by the Official Assignee to have that transfer annulled on the ground that it was a fraudulent preference, the order of adjudication is conclusive proof that the transfer was by way of a fraudulent preference and it was not open to the transferee to lead evidence to prove that the transfer was not a fraudulent preference. In such a case therefore the order of annulment had to be made as a matter of course on proof of the order of adjudication. The Judicial Committee did not hold that in such a case the order of adjudication itself annulled the transfer and no separate order of annulment was required for the purpose. In fact, it is obvious that they thought that a separate order annulling the transfer would be necessary even in such a case for otherwise

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1. (1878) L.R. 10 Ch. D. 3.
2. (1943) 2 M.L.J. 160; L.R. 70 I.A. 93 (P.C.).

they would not have stated that "the decision of the High Court avoiding the transfer is plainly right" nor while setting aside the order annulling the transfer reserved the right of the Official Assignee, should the occasion arise, to make a further application to have the transfer declared void. The case therefore does not support the proposition for which it has been cited. On the contrary, it clearly proceeds on the basis that even where the order of adjudication is based on an act of insolvency constituted by a transfer of property found to be a fraudulent preference, the transfer stands till it is set aside. In our view, this is the correct position and nothing to the contrary has been brought to our notice.

An argument had been raised at the bar that under the Provincial Insolvency Act an order of adjudication has not that binding force which *MahomedSiddique Yousuf's case*[1], held it had under the Presidency-towns Insolvency Act. It was said that this was so because the terms of the two Acts were dissimilar. We do not think it necessary to express any opinion on this question. We have discussed *Mahomed Siddique Yousuf's case*[1], only to show that it does not support the proposition for which it was cited. It is unnecessary for us to say whether it will govern a case under the Provincial Insolvency Act or what the effect of the dissimilarity pointed out in the terms of the two Acts is. That question is not before us.

There remains one other point to deal with. It is said that the Official Receiver was not entitled to take advantage of the applications for execution made by Meenakshi Achi as he had not been claiming under her but had actually claimed against her. This contention is equally unfounded. Article 182 does not say that no advantage of a previous application can be taken for the purposes of saving the bar of limitation, unless it had been made by a person under whom the applicant in a later application which is said to be barred by limitation, claimed. All that the article contemplates is an application for execution of a decree made within three years of the final order on a previous application made in accordance with law for the execution of the same decree. That being so, we must reject this contention of the appellants also.

In view of what we have already said, it becomes unnecessary to deal with the other points raised at the bar.

In the result, we think that the appeal should be dismissed and we order accordingly. The appellant must pay the costs of this appeal.

Subba Rao, J.—This appeal raises a question of limitation. There is no dispute about the facts. On May 9, 1935, one Venkatachalam Chettiar obtained a compromise decree against the appellants and respondents 2, 3 and 4 and predecessors in interest of respondents 5 and 6 in A. S. No. 226 of 1930, on the file of the High Court of Madras. Under the decree the defendants were directed to pay the plaintiff therein a sum of Rs. 1,10,101-4-0 together with interest at 3 per cent. per annum in certain instalments, the last of the instalments being payable on May 30, 1942. The decree also provided that in the event of a default in payment of any one of the instalments, the entire decree amount would become payable. On February 27, 1937, one Visvanathan Chettiar obtained a decree against the said Venkatachalam Chettiar in O.S. No. 22 of 1936, on the file of the Court of Subordinate Judge, Devakottai, for a sum of Rs. 33,000. The suit ending in the above decree was filed on January 29, 1936. On February 3, 1936, Venkatachalam Chettiar executed a deed of assignment transferring the deeree obtained by him in O.S. No. 14 of 1926 to his mother, Meenakshi Achi, for consideration. On March 26, 1936, Viswanathan Chettiar filed I.P. No. 10 of 1936 in the Court of Subordinate Judge, Devakottai, for adjudicating Venkatachalam Chettiar an insolvent on the ground that the transfer of the decree in favour of Meenakshi Achi was an act of insolvency. On December 14, 1936, the assignee, Meenakshi Achi, filed E.P. No. 37 of 1937 for recognition of the assignment in her favour and for execution of the decree. The judgment-debtors did not object either to the recognition of the assignment of the decree or the execution thereof. The said Visvanathan Chettiar intervened in the execution petition and

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1. (1943) 2 M.L.J. 16 : L.R. 70 I.A. 93 (P.C.).

applied in E. A. No. 817 of 1937 for stay of execution of the decree on the ground that he had filed an insolvency petition against the decree-holder and also on the ground that the said assignment was nominal. The learned Subordinate Judge disallowed the objection of the creditor, recognized the assignment, and permitted the assignee-decree-holder to proceed with the execution of the decree. On September 27, 1937, a settlement was entered into between the assignee-decree-holder and the judgment-debtors and the said execution petition was closed. On January 7, 1939, Venkatachalam Chettiar was adjudicated insolvent on the ground that the assignment of the said decree by him in favour of his mother, Meenkshi Achi, was an act of insolvency, whereupon his properties vested in the first respondent, the Official Receiver, Ramanathapuram, at Madurai. On August 2, 1940, the assignee-decree-holder filed another execution petition, E.P. No. 243 of 1940, and it was struck off on September 30, 1940. On January 26, 1942, the Official Receiver filed I.A. No. 20 of 1942 in I.P. No. 10 of 1936 in the Court of the Subordinate Judge, Devakottai, for setting aside the assignment, and by order, dated April 9, 1943, the assignment was set aside by the Court on the ground of fraudulent preference within the meaning of section 54 of the Provincial Insolvency Act, 1920, hereinafter called the Act. On September 27, 1943, the Official Receiver filed a fresh execution petition, E.P. No. 90 of 1944, for executing the decree. It was alleged by the appellants and the respondents 2 to 6, *inter alia*, that the said execution petition was barred by limitation on the ground that the two earlier execution petitions were not in accordance with law within the meaning of Article 182, clause (5) of the Limitation Act. The Official Receiver contended that they were in accordance with law and therefore the present execution petition was in time. He further pleaded that the present execution petition was also saved from the bar of limitation by the payments made by the judgment-debtors to Meenakshi Achi, and that, in any event, the decree in respect of the last three instalments was not barred by limitation. The learned Subordinate Judge rejected the contentions of the Official Receiver and held that the execution petition was barred by limitation. The Official Receiver preferred an appeal against the said order of the Subordinate Judge to the High Court of Madras. Govinda Menon and Basheer Ahmed Sayeed, JJ., of the said High Court came to the conclusion that the earlier execution petitions were in accordance with law and, therefore, the present execution petition was within time. They also expressed the view that the payments made by the judgment-debtors to Meenakshi Achi were valid payments and therefore they also saved the bar of limitation. In any view, they found that the last two instalments were not barred by limitation. On their findings, the learned Judges of the High Court set aside the order of the learned Subordinate Judge and remanded the execution petition to the Court of the Subordinate Judge, Devakottai, for taking steps in furtherance of execution. The present appeal to this Court was filed against the said order of remand.

Learned counsel for the appellants contended that the execution petitions, E.P. No. 37 of 1937 and E.P. No. 243 of 1940, were not in accordance with law for the following reasons: (1) The order, dated April 9, 1943, annulling the assignment of the decree by Venkatachalam Chettiar in favour of his mother, Meenakshi Achi, related back to the date of the transfer *i.e.*, February 3, 1936, and, therefore, E.P. No. 37 of 1937, which was filed on December 14, 1936 and E.P. No. 243 of 1940, which was filed on August 2, 1940, were ineffective to save the bar of limitation, as on the dates they were filed Meenakshi Achi had no title in the decree; (2) the order of adjudication, dated January 7, 1939, was based on the finding that the said assignment of the decree was an act of fraudulent preference and that the order related back to the date of the filing of I.P. No. 10 of 1936 on March 26, 1936, and, therefore the two execution petitions filed thereafter were filed by a person without title, with the result that the said two petitions were not in accordance with law; (3) assuming that the said two execution petitions were in accordance with law, the Official Receiver neither claims under, nor represents, the assignee-decree-holder, and, therefore, he has no *locus standi* to file the present execution petition ; (4) payments made by the judgment-debtors to Meenakshi Achi, who had no title in the decree, could not save the bar of limitation ; and (5) as Meenakshi Achi in her execution petitions, by

exercising her option, claimed the entire decree amount, the Official Receiver cannot now claim that the last two instalments are within time.

At the outset it may be stated that it would be sufficient if we considered the objections of the appellants in regard to E.P. No. 243 of 1940, for, if that was not in accordance with law, the present execution petition would be barred by limitation. The validity of E.P. No. 37 of 1937 was also questioned on the same grounds of attack taken against the later execution petition.

The relevant part of the Limitation Act is Article 182 and it reads :

Description of application.	*Period of Limitation.*	*Time from which period beings to run.*
For the execution of a decree or order of any Civil Court not provided for by Article 183 or by section 48 of the Code of Civil Prodecure, 1908.	Three years ; or, where a certified copy of the decree or order has been registered, six years.	(5). (where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step in aid or order.

Under this Article the latest execution petition should have been filed within three years from the date of the final order passed on an application made in accordance with law to the proper Court of execution. Taking first the second contention of the learned counsel for the appellants, the question may be posed thus : Whether the execution petition, E.P. No. 243 of 1940, filed on August 2, 1940, by Meenakshi Achi after Venkatachalam Chettiar was adjudicated insolvent on January 7, 1939, was one in accordance with law. If the order of adjudication of Venkatachalam Chettiar on the ground that the assignment of the decree made by him in favour of Meenakshi Achi was an act of insolvency *ex proprio vigore* annul the transfer in her favour, the execution petition filed by her after the said order of adjudication would not be one filed in accordance with law. On the other hand, if the assignment of the decree continued to be good till it was annulled on an application filed by the Official Receiver, which was done in the present case on April 9, 1943, the execution petition, subject to another argument that I would consider at a later stage, would be one filed in accordance with law. What then is the legal effect of such an order of adjudication? The question in the main falls to be decided on a true construction of the relevant provisions of the Act. Section 6 of the Act defines the act of insolvency ; it enumerates eight acts of insolvency, and one of them is a transfer made by a debtor which would be void as a fraudulent preference if he were adjudicated insolvent. Section 7 enables a creditor or a debtor to present an insolvency petition for adjudicating the debtor an insolvent. Section 9 lays down the conditions on which a debtor may petition. Section 13 prescribes the particulars a creditor has to give in his petition, and one of the particulars to be given is the act of insolvency committed by the debtor. When an insolvency petition is admitted, section 19 provides that notice should be given to creditors in such manner as may be prescribed, and, when the debtor is not the petitioner, notice of the order admitting the petition should be served on the debtor. On the date fixed for hearing, the Court should require proof of the matters mentioned under section 24 of the Act; it enables the Court to examine the debtor and the creditors and take the evidence adduced by them. After making the necessary enquiry, the Court may dismiss the petition or make an order of adjudication. On the making of the said order of adjudication, the whole property of the insolvent would vest in the Court or in the Receiver appointed under the Act, and the said property becomes divisible among the creditors. Under sub-section (7) of section 28 the order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition. Under section 30 notice of an order of adjudication stating the name, address and description of the insolvent, the date of adjudication, the period within which the debtor should apply for his discharge and the Court by which the adjudication is made, should be published in the Official Gazette

and in such manner as may be prescribed. It will be seen from the aforesaid provisions that till an order of adjudication is made, the person to whom the insolvent transferred his property does not come into the picture at all. The purchaser is neither a party to the proceedings nor any notice is given to him. It would, therefore, be contrary to all principles of natural justice to hold that the finding arrived at in regard to an assignment of a property by the insolvent in favour of a third party behind his back, is binding on him. If the Legislature intended that the order should have that effect, it would have provided for personal or, any rate, public notice to the purchasers, or would have given in express terms such a binding effect, and the fact that it did not do so is a clear indication of the legislative intention that an incidental finding was not intended to have such a far-reaching effect.

On the other hand, the Act makes ample provision for setting aside such transfers. Sections 53 and 54 of the Act enable the Official Receiver to have voluntary transfers made within two years of the insolvency petition and that made in fraudulent preference of one creditor over another within three months from the date of the petition annulled by the Court. If the Legislature intended to exclude a transfer constituting an act of insolvency from the operation of these provisions, it would have introduced a proviso to that effect. Therefore, unless such a transfer is duly annulled in the manner prescribed, the transfer would be valid.

That this is the intention of the Legislature is also made clear by the other provisions of the Act *vis-a-vis* transfers. The Act provides for three stages : (1) Transfers made before the presentation of the insolvency petition; (2) transfers made after the presentation of the petition and before the order of adjudication; and (3) transfers made after adjudication. A transfer made after adjudication is not binding on the Receiver. A transfer by an insolvent after the filing of the petition is also not binding on the Receiver subject to a protection clause. A purchase in good faith under a sale in execution (section 51 (3)) and a transfer *inter vivos* in good faith for valuable consideration (section 55) fall within the protected class of transactions. A transfer before the filing of the petition is binding on the Receiver unless it is annulled under sections 53, 54 or 54-A of the Act. The scheme of the Act in regard to transfers clearly demonstrates that transfers before the filing of the petition are good unless they are annulled in the manner prescribed in the Act and even the doctrine of relating back of the order of adjudication does not reach them as they fall on the other side of the line. If it was the intention of the legislature that the said order by its own force should declare the transaction void, it would have fixed the date of the transfer as the *datum* line instead of the date of the filing of the petition. It appears to me that this was designedly done to give an opportunity to the party affected to defend his title when the Official Receiver filed an application to annul the transfer. Sections 53, 54 and 28 must be reconciled and they can be reconciled without doing violence to the language of the said sections if the order of adjudication is conclusive only in regard to the status of the insolvent it declares and the transfer, though it formed the basis of the adjudication, so far as the transferee is concerned, continues to be good till set aside.

Strong reliance is placed upon the judgment of the Judicial Committee in *Mohomed Siddique Yousuf* v. *Official Assignee of Calcutta*[1], in support of contention that the finding that the transfer of the decree in favour of Meenakshi Achi was an act of insolvency was binding on the transferee, though she was not a party to the adjudication proceedings. That decision turned upon the relevant provisions of the Presidency towns Insolvency Act, 1909, and the corresponding provisions of the Bankruptcy Act of 1869. That decision cannot apply to a situation created under the Provincial Insolvency Act, unless the provisions of the said Act are *pari materia* with those of the Presidency-towns Insolvency Act and the Bankruptcy Act. A comparative study of the three sets of provisions by placing them in juxtaposition will facilitate a better understanding of the problem.

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1. (1943) 2 M.L.J. 160 : L.R. 70 I.A. 93 (P.C.).

Bankruptcy Act, 1869.	*The Presidency-towns Insolvency Act*, 1909.	*The Provincial Insolvency Act*, 1920.
Section 10.—A copy of an order of the Court adjudging the debtor to be bankrupt shall be published in the London Gazette, and be advertised locally in such manner (if any) as may be prescribed, and the date of such order shall be the date of the adjudication for the purposes of this Act, and the production of a copy of the Gazette containing such order as aforesaid shall be conclusive evidence in all legal proceedings of the debtor having been duly adjudged a bankrupt, and of the date of the adjudication.	*Section* 116 (1).—A copy of the Official Gazette containing any notice inserted in pursuance of this Act shall be evidence of the facts stated in the notice. (2) A copy of the Official Gazette containing any notice of an order of adjudication shall be conclusive evidence of the order having been duly made, and of its date.	*Section* 30.—Notice of an order of adjudication stating the name, address and description of the insolvent, the date of the adjudication, the period within which the debtor shall apply for his discharge, and the Court by which the adjudication is made shall be published in the Official Gazette and in such other manner as may be prescribed.
Section 11.—The bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being completed on which the order is made adjudging him to be bankrupt; or if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back and to commence at the time of the first of the acts of bankruptcy that may be proved to have been committed by the bankrupt within twelve months next preceding the order of adjudication; but the bankruptcy shall not relate to any prior act of bankruptcy, unless it be that at the time of committing such prior act the bankrupt was indebted to some creditor or creditors in a sum or sums sufficient to support a petition in bankruptcy, and unless such debt or debts are still remaining due at the time of the adjudication.	*Section* 51.—The insolvency of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to and to commence at— (*a*) the time of the commission of the act of insolvency on which an order of adjudication is made against him, or (*b*) if the insolvent is proved to have committed more acts of insolvency than one, the time of the first of the acts of insolvency proved to have been committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition: Provided that no insolvency petition or order of adjudication shall be rendered invalid by reason of any act of insolvency committed anterior to the debt of the petitioning creditor.	*Section* 28 (7).—An order of adjudication shall realate back to, and take effect from, the date of the presentation of the petition on which it is made.
	Section 56 (1).—Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudicated insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the Official Assignee.	*Section* 54 (1).—Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the Receiver, and shall be annulled by the Court.

Bankruptcy Act, 1869.	*The Presidencey-towns Insolvency Act*, 1909.	*The Provincial Insolvency Act*, 1920.
	(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the insolvent.	(2) This section shall not affect the rights of any person who in good faith and for valuable consideration has acquired a title through or under a creditor of the insolvent.

With some difference in the phraseology, with which we are not concerned, sections 116 and 51 of the Presidency-towns Insolvency Act are in terms similar to the corresponding sections, sections 10 and 11 of the Bankruptcy Act. Section 10 of the Bankruptcy Act and section 116 of the Presidency-towns Insolvency Act make the copy of the Official Gazette containing the order of adjudication conclusive evidence of the date of adjudication and the fact that the order of adjudication was duly made. But section 30 of the Provincial Insolvency Act, only enjoins that the notice of the order of adjudication with necessary particulars should be published in the Official Gazette and in such manner as may be prescribed ; but a copy of the said Gazette containing the said notification is not made conclusive evidence either of the facts mentioned therein or of the fact that adjudication has been duly made. Section 51 of the Presidency-towns Insolvency Act is in terms similar to that of section 11 of the Bankruptcy Act and under both the sections the insolvency of a debtor relates back to the time of the commission of the act of insolvency on which the order of adjudication has been made against him. But under section 28 (7) of the Provincial Insolvency Act, the order of adjudication relates back to and takes effect from the date of the presentation of the application on which it is made. Under section 56 the Presidency-towns Insolvency Act, transfer of a property in favour of a creditor with a view to give preference to him over other creditors shall be deemed fraudulent and void as against the Official Assignee, whereas under section 54 of the Provincial Insolvency Act, the said transfer has to be annulled by the Court. There are, therefore, essential differences in the structure of the scheme between the three Acts in the matter of adjudication.

With this background let us look at the Privy Council decision in *Mahomed Siddique Yousuf's case*[1] to ascertain the basis of that decsion. The facts in that case were : On January 20, 1939, the insolvent assigned to the appellant a decree obtained by him for consideration. On April 19, 1939, the petitioning creditor, filed a petition in the High Court for the adjudication of the insolvent as such. One of the acts of insolvency alleged was the said assignment of the decree in favour of the appellant. On June 13, 1939, an adjudication order was made against the insolvent. No one appeared except the petitioning creditor, and the order recited that the insolvent had committed each of the acts of insolvency alleged in the petition. On November 23, 1939, the Official Assignee gave notice of motion in the Insolvency Court for a declaration that the indenture of assignment dated January 20, 1939, should be declared void as against the Official Assignee and that the transfer should be set aside. The Judge in Insolvency held on the merits that the said transfer was void under section 56 of the Presidency-towns Insolvency Act. On appeal the High Court held that the order of adjudication was conclusive evidence against the appellant that the assignment was a fraudulent preference, and on that ground it declared the transfer void. On further appeal, the Privy Council agreed with the High Court. Relying on the decision in *Ex parte Learoyd*[2], a decision on analogous provisions of the Bankruptcy Act, the Privy Council made the following observations at page 98 :

"The provisions of the Presidency-towns Insolvency Act, 1909, are also in similar terms, and their Lordships feel no doubt that the principles of the English decision are as valid in India as in England. No doubt it is anomalous that a decision affecting the right of a third party should be conclusively determined against him in his absence, and even without notice to him, but the words of the section and the importance of maintaining the status of the debtor as determined by an order

1. (1943) 2 M.L.J. 160 : L.R. 70 I.A. 93 (P.C.). 2. (1878) L.R. 10 Ch. D. 3.

of adjudication, and the necessity of securing the stability of the administration of the debtor's estate once his status has been fixed, have been justly held to outweigh the consideration of hardship to the private citizen."

But the Privy Council came to the conclusion, on the facts, that a case was made out for the High Court for excusing the delay in preferring the appeal against the order of adjudication. On that view they set aside the order of the High Court and made the following observations for its guidance, at page 99 :

"It may be that if the appellant takes advantage of the extension of time and appeals, the High Court may adopt the procedure in *Ex parte Tucker*[1] and content themselves with striking out the act of bankruptcy complained of, and leaving the Official Assignee to make a fresh application without themselves determining the facts."

This decision decides three points, namely, (1) having regard to the express provisions of the Presidency-towns Insolvency Act, and for maintaining the status of the debtor and the stability of the administration of his estate, the decision affecting the rights of a third party though made behind his back, would be binding on him ; (ii) an appeal can be entertained against the order of adjudication at the instance of the transferee, and, if necessary, by excusing the delay in preferring the appeal ; and (iii) in such an appeal, the High Court may strike out one of the acts of insolvency, *i.e.*, the transfer in favour of the appellant, and leave it to the Official Assisgnee to make a fresh application. Though the principles underlying the relevant provisions of the Act were expounded, the decision mainly rested on the express provisions of the Presidency-towns Insolvency Act. Nor did the Privy Council hold that when there was an order of adjudication on the basis of an act of insolvency, there was no necessity on the part of the Official Assignee to take out an application for setting aside the transfer constituting the act of insolvency. Though it is not very clear, it appears to me that what the Privy Council stated was that in such an application the decision on the transfer forming part of the order of adjudication is conclusive evidence of the invalidity of the transfer. To put it differently, in such an application the Official Assignee need not prove afresh that the transfer was a fraud on creditors or an act of fraudulent preference. That decision was mainly based upon *Ex parte Learoyd*[2], which in its turn was founded upon the interpretation of sections 10 and 11 of the Bankruptcy Act—sections corresponding to sections 116 and 51 of the Presidency-towns Insolvency Act. A scrutiny of that decision, therefore, will disclose the *raison detre* of the decision of the Privy Council. There, on August 30, 1877. an insolvent executed in favour of George Payne a bill of sale of his household furniture, etc., by way of security for consideration. The goods remained in the apparent possession of the mortgagor until January 1, 1878, when Payne removed them, On January 3, 1878, a bankruptcy petition was presented against the insolvent by a creditor, relying upon an alleged act of bankruptcy, namely, that the insolvent, being a trader, departed from his dwelling-house on December 31, 1877. On January 3, 1878, an order of adjudication was made on the petition upon proof of the said act of bankruptcy, and that order was advertised in the usual way in the London Gazette. On January 8, 1878, the goods removed by Payne were sold on his behalf. The trustees in the Bankruptcy claimed the proceeds of the sale, and the Judge of the County Court ordered the payment. On appeal Bacon, C.J., allowed the appeal on the ground that it had not been established that there was an act of insolvency before Payne took possession of the goods. On further appeal, the Court of Appeal set aside the judgment of Bacon, C.J., on the ground that by virtue of sections 10 and 11 of the Bankruptcy Act, 1869,

"a bill of a sale holder is conclusively bound by the adjudication so long as it stands, and cannot dispute that the act of bankruptcy on which the adjudication professedly proceeded was in fact committed,"

and that the trustee's title related back to that act of bankruptcy. James, L.J. after a brief survey of the historic background of the Bankruptcy Act, based his judgment mainly on the construction of the provisions of sections 10 and 11 of the Bankruptcy Act. The learned Judge observed at page 8 :

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1. (1879) L.R. 12 Ch. D. 308.

2. (1878) L.R. 10 Ch. D. 3.

"A man cannot be 'duly' adjudged a bankrupt, unless the great requisite of all exists, that he has committed an act of bankruptcy. That is the capital offence of which he must have been guilty before he can be 'duly' adjudged a bankrupt. That he has been 'duly' adjudged a bankrupt, necessarily involves the previous commission of an act of bankruptcy. The mere fact that an adjudication has been made could have been proved without the aid of section 10. That section may, however, only involve this, that some act of bankruptcy had been committed before the adjudication was made. But then comes section 11, which has no operation at all as between the bankrupt and the trustee. The bankrupt has no rights whatever ; all his rights have been transferred to the trustee. The mere fact that section 11 is dealing with the relation back of the trustee's title, shews that it is dealing with the rights of third persons, and not merely with the rights of the bankrupt and persons indebted to him...........Then section 11 goes on to provide that, by way of enlargement of the trustee's title, he may go behind the act of bankruptcy on which the adjudication was founded, and may, under certain circumstances and subject to certain limitations, prove that other earlier acts of bankruptcy have been committed, and if this is done the trustee's title is to relate back to the earliest act of bankruptcy which is proved to have been committed within twelve months before the adjudication. This, however, is to be proved by evidence, whereas the act of bankruptcy on which the adjudication is founded is proved by the production of the adjudication itself. It seems to me to be impossible to evade the words of these sections."

Baggallay, L.J., also, after emphasizing on the words "duly made" in section 10 of the Bankruptcy Act, remarked on the scope of section 11 thus, at page 10 :

"But then comes section 11, which I think, if more was needed, makes the adjudication conclusive on third persons that the act of bankruptcy on which it was founded was really committed."

Thesiger, L.J., also said much to the same effect, at page 11 :

"We start, therefore, with this, that we are bound to hold conclusively that a 'due' adjudication was made on the 3rd January. It must, therefore, have been founded upon a proper act of bankruptcy. Then section 11 goes still further, and it is important to compare it with the provisions contained in the prior Bankruptcy Acts. Sections 234 and 235 enabled third person to dispute the act of bankruptcy upon giving notice of their intention so to do. That provision is swept away by the Act of 1869, and in language clear and distinct the Legislature has said by section 11 that 'the bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being completed on which the order is made adjudging him to be bankrupt'".

From the aforesaid extracts from the judgments, it is manifest that the decision turned upon the express provisions of sections 10 and 11 of the Bankruptcy Act. Under section 10 of that Act, the Gazette containing the order was conclusive evidence that the order of adjudication was duly made on the basis of an act of insolvency and section 11 fixed the *datum* line for the commencement of the trustee's title from the act of bankruptcy. The former section made the order of adjudication conclusive against third parties and the latter section vested, the title of the property concerned in the Official Receiver from the date of the act of insolvency. This judgment, therefore, cannot be applied to an Act which differs in all respects from the relevant provisions of sections 10 and 11 of the Bankruptcy Act on the basis of which that judgment was given. In the Provincial Insolvency Act, neither the order of adjudication is conclusive evidence that it has been duly made, nor the trustee's title dates back to the act of insolvency on which the adjudication is founded. I am, therefore, of the view that neither the decision in *Ex parte Learoyd*[1] based on the provisions of the Bankruptcy Act, 1869, nor the Privy Council decision in *Mahomed Siddique Yousuf* v. *Official Assignee of Calcutta*[2], based upon the provisions of the Presidency-towns Insolvency Act, has any bearing in construing the relevant provisions of the Provincial Insolvency Act. A similar view was expressed by a Full Bench of the Madras High Court in *The Official Receiver, Guntur* v. *Narra Gopala Krishnayya*[3] and by a Full Bench of the Nagpur High Court in *P. G. Sahasrabudhe* v. *Kila Chand Deochand & Co., Bombay*[4]. Both Courts held that the decision of the Privy Council did not apply to a case under the Provincial Insolvency Act and that a transferee, who was not a party to the adjudication proceeding, could contend in subsequent proceedings for annulment that his transfer was good notwithstanding that the order of adjudication was based on the alleged transfer as being an act of insolvency. I accept the correctness of the said two decisions. If so, it follows that the order of adjudication made in the present case did not by its own force divest the title of Meenakshi Achi and vest

1. (1878) L.R. 10 Ch. D. 3.
2. (1943) 2 M.L.J. 160 : L.R. 70 I.A. 93 (P.C.).
3. (1945) 1 M.L.J. 17 : I.L.R. (1945) Mad. 541 (F.B.).
4. I.L.R. (1947) Nag. 85 (F.B.).

it in the Official Receiver and that she continued to be the transferee of the decree at the time when she filed the second execution petition, E.P. No. 243 of 1940.

For the same reasons, when E.P. No. 37 of 1937 was filed, Meenakshi Achi had subsisting title to the decree under the transfer deed dated February 3, 1936, and, therefore, the said execution petition was also in accordance with law.

The next argument of the learned counsel for the appellants is that the order of the Insolvency Court dated April 9, 1943, related back to the date of the transfer *i.e.*, February 3, 1936, and that by the order of anulment, the transfer became void from its inception, with the result that on the dates when the Execution Petitions Nos. 37 of 1937 and 243 of 1940 were filed, Meenakshi Achi had no title to the decree, and, therefore, the said petitions were not filed in accordance with law. The answer to this contention depends upon the true legal effect of the order of annulment of the transfer on the ground of fraudulent preference. That part of section 54 of the Provincial Insolvency Act so far relevant to the present enquiry reads thus :

Section 54 (1).—" Every transfer of property........in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court.

(2) This section shall not affect the rights of any person who in good faith and for valuable consideration has acquired a title through or under a creditor of the insolvent."

It is clear from the provisions of this section that a transfer of property by a debtor before insolvency in favour of a creditor giving him preference over other creditors is not absolutely void. As between the transferor and the transferee, the title in the property conveyed passes from one to the other, but it is liable to be annulled at the instance of the Receiver. This is because the Insolvency Act confers on the Official Receiver a title superior to that of the insolvent enabling the former to get it annulled in the interest of the creditors. Sub-section (2) of that section also indicates that the transfer is not void *ab initio*, for under that sub-section the rights of any person, who in good faith and for valuable consideration acquired title through or under a creditor of the insolvent, are protected. If the transfer was *ab initio* void in the sense that it is a nullity, all the depending transactions should fall with it. Emphasis is laid upon the word "void" in section 54 (1) of the Act, but the said word in the context can only mean voidable, for it is made void only against the Receiver and requires to be annulled by the Court. It follows from the aforesaid premises that such a transfer is valid till annulled in the manner prescribed by the provisions of the Provincial Insolvency Act.

The legal effect of annulling a transfer under section 53 of the Act was considered by a Division Bench of the Madras High Court in *The Official Receiver, Coimbatore* v. *Palaniswami Chetti*[1]. In that decision, Devadoss, J., observed as under at page 758:

" But till such a declaration is made by the Insolvency Court under section 53, the transaction is good and the mortgagee could proceed with the suit or with the execution of his decree against the insolvent's property."

Wallace, J., elaborated thus, at page 764 :

" Section 53 implies an attack by the Official Receiver on behalf of the general body of creditors and the remedy which he is entitled to get on proving his case is that the transfer is voidable against him and may be annulled by the Court........... It does not really affect the relationship of the transferor and transferee as mortgagor and mortgagee. For example, if the property is sold by the Official Receiver, and the creditors and costs are fully paid out of the proceeds and there is a surplus remaining, that surplus belongs *prima facie* to the transferee and not to the transferor, and is his unless the transferor has by appropriate proceedings established his right to it. ....The relationship between the mortgagor and mortgagee remains unaffected by any proceedings under section 53, and the mortgagee is entitled therefore to enforce his mortgage against the mortgagor except so far as proceedings under section 53 may have held the property mortgaged as assets of the mortgagor at the disposal of the general body of creditors ".

1. (1925) 49 M.L.J. 203 : I.L.R. 48 Mad. 750.

The observations of the learned Judges establish two propositions : (i) that the transaction *inter se* between the debtor and transferee is good ; and (ii) it is not binding on the Official Receiver so far as it is necessary to protect the interests of the creditors. The decision in *Amir Ahmad* v. *Saiyid Hasan*[1] is also one laying down the legal effect of section 53 of the Act. The learned Judges made the following observations in that case, at page 903 :

" It seems quite clear that if a transfer made by a debtor is wholly fictitious and bogus and no interest in the property passes to the transferee, then the transfer is void *ab initio* and subsequent transferees can never be protected because the foundation of their title does not exist .... On the other hand, if the transfer made by the debtor was not wholly fictitious and bogus but the intention of the parties was that property should in fact pass to the transferee, then the result would depend on whether the transferee was a purchaser in good faith and for valuable consideration or not. The transfer for the time being is valid, though it is voidable, at the option of the Receiver, and it is discretionary with the Court to annul it under section 53 of the Provincial Insolvency Act."

The said observations will apply *mutatis mutandis* to a situation under section 54 of the Act. Indeed, a Division Bench of the Nagpur High Court in *Rukhmanbai* v. *Govindram*[2] in the context of section 54 of the Act, stated to the same effect thus at page 275 :

" The wording of the section (section 54) thus very clearly indicates that a transfer of the nature mentioned therein is voidable as against the Receiver and is not void *ab initio* and may be annulled by the Court. ....It is thus clear from the section that till the transfer is actually annulled by the Court it remains a valid transaction."

The aforesaid discussion yields the following result: (1) a transfer by a debtor of his property before insolvency in favour of a creditor with a view to giving him preference over other creditors conveys a valid title to the transferee ; (2) under circumstances mentioned in section 54 of the Act, it is voidable against the Receiver; (3) when it is annulled by the Court on the ground of fraudulent preference, the property vests in the Official Receiver, who can administer it in the interest of the creditors ; and (4) even after the transfer is annulled, it continues to be good between the transferor and transferee, and in a contingency of any balance remaining of the sale proceeds after the creditors are fully paid, the transferee would be entitled to the same.

Two lines of decisions have been relied upon by the learned counsel for the appellants. The first one holds that in the case of conflicting claims to an estate, the claimant ultimately declared to be the owner thereof by the final Court cannot rely to save the bar of limitation, upon a petition filed by the rival claimant to execute the decree pertaining to the estate at the time the title was in his favour ; and the other decides that, when a transfer is set aside on the ground of fraudulent preference, the Official Receiver can claim to recover mesne profits from the transferee of the property of an insolvent from the date of the transfer. The first line of decisions turns upon the principle that a defeated claimant had no title to the property at the time he filed the application, for the effect of the final decree is that the said claimant had no title at any time, and the second line of decisions is founded on some equitable doctrine. There are also decisions taking the contrary view. It is not necessary in this case either to go into that question or attempt to resolve the conflict. As I have held that in the case of a transfer in fraud of creditors or by fraudulent preference, the transfer is good till set aside by the Court, the transferee would have title to file the execution petition before the transfer was set aside.

The third contention of the learned counsel for the appellants is a weak one. It is said that the Official Receiver does not claim under Meenakshi Achi, and, therefore, he cannot rely upon the execution petition filed by her to save the bar of limitation. There is a fallacy underlying this argument. The question for decision is not whether the Official Receiver claims under Meenakshi Achi but, whether the execution petitions filed by her were in accordance with law. If, as I held, at the time the previous execution petitions were filed, Meenakshi Achi had a valid title to execute the decree, the execution petitions filed by her would certainly be in accordance with law within the meaning of Article 182 (5) of the Indian Limitation Act. I, therefore, reject this contention.

1. (1935) I.L.R. 57 All. 900. 2. I.L.R. (1946) Nag. 273.

In view of the aforesaid conclusions arrived at by me, the last two contentions based on payments of instalments do not arise for consideration.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, N.H. BHAGWATI AND M. HIDAYATULLAH, JJ.

Messrs. Godrej & Co. .. *Appellants**

v.

The Commissioner of Income-tax, Bombay City, Bombay .. *Respondent.*

Income-tax Act (XI of 1922)—Lump sums received by managing agents in lieu of the higher percentage of profits provided as remuneration of period of managing agency—If capital or revenue receipt liable to tax.

A managing agency yielding a remuneration calculated at the rate of 20 per cent. of the profits is not the same thing as a managing agency yielding a remuneration calculated at 10 per cent. of the profits provided under a subsequent agreement varying the earlier agreement. There is a distinct deterioration in the character and quality of the managing agency viewed as a profit-making apparatus and this deterioration is of an enduring kind. The reduced remuneration having been separately provided the lump sum of Rs. 7,50,000 (paid by the managed company as compensation, for releasing the company from the term as to 20 per cent. remuneration contained in the original agency agreement) must be regarded as having been paid as compensation for this injury to or deterioration of the managing agency. The sum of Rs. 7,50,000 was paid and received not to make up the difference between the higher remuneration and the reduced remuneration but was in reality paid and received as compensation for releasing the company from the onerous terms as to remuneration as it was in terms expressed to be. In other words, so far as the managed company was concerned, it was paid for securing immunity from the liability to pay higher remuneration to the managing agency for the rest of the term of agency and, therefore a capital expenditure and so far as the managing agency was concerned it was received as compensation for the deterioration or injury to the managing agency by reason of the release of its rights to get higher remuneration and, therefore a capital receipt not liable to tax.

Case-law reviewed.

Appeal from the Judgment and Order, dated the 11th September, 1953, of the Bombay High Court in Income-tax Reference No. 23 of 1953.

A. V. Viswanatha Sastri, Senior Advocate (*S. N. Andley* and *J. B. Dadachanji*, Advocates of *Messrs. Rajinder Narain & Co.*, with him), for Appellants.

M. C. Setalvad, Attorney-General for India (*K. N. Rajagopal Sastri* and *D. Gupta*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Das, C.J.—This is an appeal from the Judgment and Order of the High Court of Bombay delivered on September 11, 1953, on a reference made by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-tax Act, whereby the High Court answered the referred question in the affirmative and directed the appellant to pay the costs of the respondent.

The appellant, which is a registered firm and is hereinafter referred to as " the assessee firm " was appointed the managing agent of Godrej Soaps Limited (hereinafter called the "managed company"). It has been working as such managing agent since October, 1928, upon the terms and conditions recorded originally in an agreement, dated October 28, 1928, which was subsequently substituted by another agreement, dated December 8, 1933, (hereinafter referred to as " the Principal Agreement"). Under the Principal Agreement the assessee firm was appointed managing agent for a period of thirty years from November 9, 1933. Clause 2 of that Agreement provided as follows :—

" The Company shall during the subsistence of this agreement pay to the said firm and the said firm shall receive from the company the following remuneration, that is to say :

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* Civil Appeal No. 183 of 1956. 4th August, 1959.

(*a*) A commission during every year at the rate of twenty per cent. on the net profits of the said company after providing for interest on loans, advances and debentures (if any) working expenses, repairs, outgoings and depreciation but without any deduction being made for income-tax and super-tax and for expenditure on capital account or on account of any sum which may be set aside in each year out of profits as reserve fund.

(*b*) In case such net profits of the Company after providing for interest on loans, advances and debentures (if any), working expenses, depreciation, repairs and outgoings and after deduction therefrom the commission provided for by sub-clause (*a*) shall during any year exceed a sum of rupees one lac the amount of such excess over rupees one lac up to a limit of rupees twenty-four thousand.

(*c*) In case such net profits of the Company after providing for interest on loans, advances, and debentures (if any) working expenses, depreciation, repairs and outgoings and after also deducting therefrom the commission provided for by sub-clause (*a*) shall during any year exceed a sum of rupees one lac and twenty-four thousand one half of such excess over rupees one lac and twenty-four housand shall be paid to the firm and the other half to the shareholders."

Some of the shareholders and directors of the managed company felt that the scale of remuneration paid to the assessee firm under clause (2) of the Principal Agreement was extraordinarily excessive and unusual and should be modified. Accordingly negotiations were started for a reduction of the remuneration and, after some discussion, the assessee firm and the managed company arrived at certain agreed modifications which were eventually recorded in a special resolution passed at the extraordinary general meeting of the managed company held on October 22, 1946. That resolution was in the following terms :—

" Resolved that the agreement arrived at between the managing agents on the one hand and the directors of your Company on the other hand, that the managing agents, in consideration of the Company paying Rs. 7,50,000 as compensation, for releasing the Company from the onerous term as to remuneration contained in the present managing agency agreement should accept as remuneration for the remaining term of their managing agency ten per cent. of the net annual profits of the Company as defined in section 87-C, sub-section (3) of the Indian Companies Act in lieu of the higher remuneration to which they are now entitled under the provisions of the existing managing agency agreement be and the same is hereby approved and confirmed.

Resolved that the Company and the managing agents do execute the necessary document modifying the terms of the original managing agency agreement in accordance with the above agreement arrived at between them. Such document be prepared by the Company's solicitors and approved by the managing agents and the directors shall carry the same into effect with or without modification as they shall think fit."

The agreed modifications were thereafter embodied in a Supplementary Agreement made between the assessee firm and the managed company on March 24, 1948. After reciting the appointment of the assessee firm as the Managing Agent upon terms contained in the Principal Agreement and further reciting the agreement arrived at between the parties and the resolution referred to above, it was agreed and declared as follows :

" 1. That the remuneration of the Managing Agents as from the 1st day of September, 1946, shall be ten per cent. of the net annual profits of the Company as defined in section 87-C, sub-section (3) of the Indian Companies Act, 1913, in lieu of the higher remuneration as provided in the above recited clause (2) of the Principal Agreement.

2. Subject only to the variations herein contained and such other alterations as may be necessary to make the Principal Agreement consistent with these presents the principal agreement shall remain in full force and effect and shall be read and construed and be enforceable as i the terms of these presents were inserted therein by way of substitution."

The sum of Rs. 7,50,000 was paid by the managed company and received by the assessee firm in the calendar year 1947 which was the accounting year for the assessment year 1948-49.

In the course of the assessment proceedings for the assessment year 1948-49, it was contended by the departmental representative, (i) that though the payment of Rs. 7,50,000 had been described as compensation, the real object and consideration for the payment was the reduction of remuneration, (ii) that that being the character of payment, it was a lump sum payment in consideration of the variation of the terms of employment and was, therefore, not a capital receipt but was a revenue receipt, and (iii) that there was, in fact, no break in service and the payment was made in course of the continuation of the service and, therefore, represented a revenue receipt

of the managing agency business of the assessee firm. The assessee firm, on the other hand, maintained that the sum of Rs. 7,50,000 was a payment made by the managed company to the assessee firm wholly in discharge of its contingent liability to pay the higher remuneration and in order to discharge itself of an onerous contingent obligation to pay higher remuneration and it was, therefore, a capital expenditure incurred by the managed company and a capital receipt obtained by the assessee firm and was as such not liable to tax.

The Income-tax Officer treated the sum of Rs. 7,50,000 as a revenue receipt in the hands of the assessee firm and taxed it as such. On appeal this decision was confirmed by the Appellate Assistant Commissioner and thereafter, on further appeal, was upheld by the tribunal by its order dated July 23, 1952. At the instance of the assessee firm the Tribunal, under section section 66 (1) of the Act, made a reference to the High Court raising the following question of law :—

" Whether on the facts and in the circumstances of the case the sum of Rs. 7,50,000 is a revenue receipt liable to tax ".

The said reference was heard by the High Court and by its judgment, pronounced, on September 11, 1953, the High Court answered the referred question in the affirmative and directed the assessee firm to pay the costs of the reference. The High Court, however, gave to the assessee firm a certificate of fitness for appeal to this Court and that is how the appeal has come before us.

As has been said by this Court in *Coimmsioner of Income-tax and Excess Profits Tax, Madras* v. *The South India Pictures Ltd.*[1]

" It is not always easy to decide whether a particular payment received by a person is his income or whether it is to be regarded as his capital receipt ".

Eminent Judges have observed that "income" is a word of the broadest connotation and that it is difficult, and perhaps impossible, to define it by any precise general formula. Though in general the distinction between an income and a capital receipt is well recognised, cases do arise where the item lies on the borderline and the problem has to be solved on the particular facts of each case. No infallible criterion or test has been or can be laid down and the decided cases are only helpful in that they indicate the kind of consideration which may relevantly be borne in mind in approaching the problem. The character of payment received may vary according to the circumstances. Thus, the amount received as consideration for the sale of a plot of land may ordinarily be capital; but if the business of the recipient is to buy and sell lands, it may well be his income. It is therefore, necessary to approach the problem keeping in view the particular facts and circumstances in which it has arisen.

There can be no doubt that by paying this sum of Rs. 7,50,000 the managed company has secured for itself a release from the obligation to pay a higher remuneration to the assessee firm for the rest of the period of managing agency covered by the Principal Agreement. *Prima facie*, this release from liability to pay a higher remuneration for over 17 years must be an advantage gained by the managed company for the benefit of its business and the immunity thus obtained by the managed company may well be regarded as the acquisition of an asset of enduring value by means of a capital outlay which will be a capital expenditure according to the test laid down by Viscount Cave, L.C., in *Atherton* v. *British Insulated and Helsby Cables, Ltd.*[2], referred to in the judgment of this Court in *Assam Bengal Cement Co., Ltd.* v. *Commissioner of Income-tax*[3]. If the sum of Rs. 7,50,000 represented a capital expenditure incurred by the managed company, it should, according to learned counsel for the assessee firm, be a capital receipt in the hands of the assessee firm, for the intrinsic characterisics of capital sums and revenue items respectively are essentially the same for receipts as for expenditure. (*See* Simon's Income-tax, II Edn., Vol. 1, para. 44, p. 31),

1. (1956) S.C.J. 479 : (1956) 2 M.L.J. (S.C.) 21 : (1956) An. W.R. (S.C.) 215 : (1956) S.C.R. 223, 228.

2. (1925) 10 Tax Cas. 155.

3. (1955) S.C.J. 205 : (1955) 1 M.L.J. (S.C.) 118 : (1955) 1 S.C.R. 972.

But, as pointed out by the learned author in that very paragraph, this cannot be an invariable proposition, for there is always the possibility of a particular sum changing its quality according as the circumstances of the payer or the recipient are in question. Accordingly the learned Attorney-General appearing for the respondent contends that we are not concerned in this appeal with the problem, whether, from the point of view of the managed company, the sum represented a capital expenditure or not but that we are called upon to determine whether this sum represented a capital receipt in the hands of the assessee firm.

In the Resolution adopted by the managed company as well as in the recitals set out in the Supplementary Agreement this sum has been stated to be a payment "as compensation for releasing the company from the onerous term as to remuneration contained " in the Principal Agreement. It is true, as said by the High Court and as reiterated by the learned Attorney-General, that the language used in the document is not decisive and the question has to be determined by a consideration of all the attending circumstances ; nevertheless, the language cannot be ignored altogether but must be taken into consideration along with other relevant circumstances.

This sum of Rs. 7,50,000 has undoubtedly not been paid as compensation for the termination or cancellation of an ordinary business contract which is a part of the stock-in-trade of the assessee and cannot, therefore, be regarded as income, as the amounts received by the assessee in *The Commissioner of Income-tax and Excess Profits Tax* v. *The South India Pictures Ltd.*[1] altogether and in *The Commissioner of Income-tax, Nagpur* v. *Rai Bahadur Jairam Valji*[2], had been held to be. Nor can this amount be said to have been paid as compensation for the cancellation or cessation of the managing agency of the assessee firm, for the managing agency continued and, therefore, the decision of the Judicial Committee of the Privy Council in *The Commissioner of Income-tax* v. *Shaw Wallace and Co.*,[3] cannot be invoked. It is, however, urged that for the purpose of rendering the sum paid as compensation to be regarded as a capital receipt it is not necessary that the entire managing agency should be acquired. If the amount was paid as the price for the sterilisation of even a part of a capital asset which is the framework or entire structure of the assessee's profit-making apparatus, then the amount must also be regarded as a capital receipt, for, as said by Lord Wrenbury in *Glenboig Union Fireclay Co. Ltd* v. *The Commissioners of Inland Revenue*[4], " what is true of the whole must be equally true of part "—a principle which has been adopted by this Court in *The Commissioner of Income-tax, Hyderabad-Deccan* v. *Messrs. Vazirn Sulta and Sons*[5]. The learned Attorney-General, however, contends that this case is not governed by the decisions in *Shaw Wallace's case*[3], or *Messrs. Vazir Sultan and Sons' case*[5], because in the present case there was no acquisition of the entire managing agency business or sterilisation of any part of the capital asset and the business structure or the profit-making apparatus, namely, the managing agency, remains unaffected. There is no destruction or sterilisation of any part of the business structure. The amount in question was paid in consideration of the assessee firm agreeing to continue to serve as the managing agent on a reduced remuneration and, therefore, it bears the same character as that of remuneration and, therefore, a revenue receipt. We do not accept this contention. If this argument were correct, then, on a parity of reasoning, our decision in *Messrs. Vazir Sultan and Son's case*[5], would have been different, for, there also the agency continued as before except that the territories were reduced to their original extent. In that case also the agent agreed to continue to serve with the extent of his field of activity limited to the State of Hyderabad only. To regard such an agreement as a mere variation in the terms of remuneration is only to take a superficial view of the matter and to ignore the effect of such variation on what has been called the profit-making apparatus. A managing agency yielding a remuneration calculated at the rate of 20

1. (1956) S.C.J. 479: (1956) 2 M.L.J. (S.C). 21: (1956) An.W.R. (S.C.) 215 : (1956) S.C.R. 223, 228.
2. (1959) 35 I.T.R. 148.
3. (1932) L.R. 59 I.A. 206: 63 M.L.J. 124
4. (1922) 12 Tax Cas. 427.
5. Civil Appeal No. 346 of 1957 decided on. 20th March, 1959.

per cent. of the profits is not the same thing as a managing agency yielding a remuneration calculated at 10 per cent. of the profits. There is a distinct deterioration in the character and quality of the managing agency viewed as a profit-making apparatus and this deterioration is of an enduring kind. The reduced remuneration having been separately provided, the sum of Rs. 7,50,000 must be regarded as having been paid as compensation for this injury to or deterioration of the managing agency just as the amounts paid in *Glenboig's case*[1] or *Messrs. Vazir Sultan's case*[2], were held to be. This case is also very nearly covered by the majority decision of the English House of Lords in *Hunter* v. *Dewhurst*[3]. It is true that in the later English cases of *Prendergast* v. *Cameron*[4], and *Wales* v. *Tilley*[5], the decision in *Hunter* v. *Dewhurst*[3], was distinguished as being of an exceptional and special nature but those later decisions turned on the words used in Rule I of Schedule E to the English Act. Further, they were cases of continuation of personal service on reduced remuneration simpliciter and not of acquisition, wholly or in part, of any managing agency viewed as a profit-making apparatus and consequently the effect of the agreements in question under which the payment was made upon the profit-making apparatus did not come under consideration at all. On a construction of the agreements it was held that the payments made were simply remuneration paid in advance representing the difference between the higher rate of remuneration and the reduced remuneration and as such a revenue receipt. The question of the character of the payment made for compensation for the acquisition, wholly or in part, of any managing agency or injury to or deterioration of the managing agency as a profit-making apparatus is covered by our decisions hereinbefore referred to. In the light of those decisions the sum of Rs. 7,50,000 was paid and received not to make up the difference between the higher remuneration and the reduced remuneration but was in reality paid and received as compensation for releasing the company from the onerous terms as to remuneration as it was in terms expressed to be. In other words, so far as the managed company was concerned, it was paid for securing immunity from the liability to pay higher remuneration to the assessee firm for the rest of the term of the managing agency and, therefore, a capital expenditure and so far as the assessee firm was concerned, it was received as compensation for the deterioration or injury to the managing agency by reason of the release of its rights to get higher remuneration and, therefore, a capital receipt within the decisions of this Court in the earlier cases referred to above.

In the light of the above discussion it follows, therefore, that the answer to the referred question should be in the negative. The result, therefore, is that this appeal is allowed, the answer given by the High Court to the question is set aside and the question is answered in the negative. The appellant must get the costs of the reference in the High Court and in this Court.

Appeal allowed.

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1. (1922) 12 Tax Cas. 427.
2. Civil. Appeal No. 346 of 1957, decided on 20th March, 1959.
3. (1932) 16 Tax Cas. 605.
4. (1940) 23 Tax Cas. 122.
5. (1942) 25 Tax Cas. 136.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—B. P. SINHA, P. B. GAJENDRAGADKAR AND K. N. WANCHOO, JJ.

Sitaram Ramcharan etc., etc. .. *Appellants**

v.

M. N. Nagrashana, Authority under Payment of Wages Act, Ahmedabad, and others .. *Respondents.*

Payment of Wages Act (IV of 1939), section 15 (2) Second proviso—Scope—Delay in preferring claim for overtime wages—When can be condoned—Ignorance of law—If sufficient cause.

The Second proviso to section 15 (2) of the Payment of Wages Act is in substance similar to the provision in section 5 of the Limitation Act. In dealing with the question of condoning delay under those provisions the party has to satisfy the Court that he had sufficient cause for not preferring the appeal or making the application within the prescribed time and the explanation has to cover the whole of the period of delay. Where the applicant failed to establish sufficient cause for his inaction between the date when the law was clarified by a decision of a tribunal and the date on which the application claiming overtime wages was filed the delay cannot be condoned.

Quaere :—Whether ignorance of law can be said to constitute sufficient cause within the meaning of the Proviso to section 15 (2) of the Payment of Wages Act ?

Appeals from the Judgment and Order, dated the 22nd June, 1954, of the Bombay High Court in Special Civil Applications Nos. 285, 348, 1214 to 1221 and 2356 to 2365 of 1954.

N. V. Phadke and *S. S. Shukla* and *Mrs. E. Udayaratnam,* Advocates for Appellants.

M. C. Setalvad, Attorney-General for India, (*J. B. Mehta,* Advocate and *J. B. Dadachanji, S. N. Andley* and *Rameshwar Nath,* Advocates of *M/s. Rajinder Narain & Co.,* with him) for Respondent No. 2 (in C. As. Nos. 9-14, 16-20 and 22-28).

B. K. B. Naidu and *I. N. Shroff,* Advocates for Respondent No. 2 (In Civil Appeal No. 15 of 1957.

The Judgment of the Court was delivered by

Gajendragadkar, J.—This group of consolidated appeals has come before this Court with a certificate granted by the High Court at Bombay under Article 133 of the Constitution; the certificate shows that according to the High Court the amount of the value of the subject-matter in dispute involved in these consolidated appeals exceeds Rs. 20,000 and they raise a substantial question of law.

The 385 appellants concerned in these 20 appeals are employees in the Watch and Ward department of various textile mills in Ahmedabad. They had filed 20 applications between July 22, 1953, to October 6, 1953, before the authority under the Payment of Wages Act (hereinafter called the authority) and had claimed overtime wages for the period between January, 1951, to December, 1951, and June-July, 1953. These applications were accompanied by another set of 20 applications in which they prayed for condonation of delay made in putting forward the claim for overtime wages under the second proviso to section 15 (2) of the Payment of Wages Act (IV of 1936) (hereinater called the Act). The authority considered the case made out by the appellants for condonation of delay and held that they had failed to prove sufficient cause for not making their applications within the prescribed period. The appellants then moved the High Court at Bombay under Articles 226 and 227 of the Constitution. These applications also failed and were dismissed. Then the appellants moved the High Court for a certificate, and a certificate was granted to them. It is with this certificate that they have come to this Court.

It is necessary at first to set out the circumstances under which the appellants have made their claim for overtime wages in their present applications. Section 59 of the Factories Act, 1948 (LXIII of 1948) which came into force on September 23, 1948, provides for the payment of extra wages for overtime to persons who are workers

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* Civil Appeals Nos. 9 to 28 of 1957. 25th September, 1959.

as defined by section 2 (1) of the Act. It is common ground that the appellants are not workers under the said section ; and so they did not claim any of the benefits conferred on workers by the provisions of the Factories Act. The Bombay Shops and Establishments Act, 1948 (Bombay Act LXXIX of 1948) came into force in the State of Bombay on January 11, 1949; and it is not denied that the appellants are employees under section 2 (6) of the said Act. Section 70 of this Act provides for the application of section 59 of the Factories Act to all employees working in factories like the appellants, but the words used in section 70 are not very clear and the effect of its provisions was a matter of doubt which was finally resolved by the decision of this Court in the case of *Shri B.P. Hira, Works Manager, Central Railway, Parel, Bombay, etc.*, v. *Shri C. M. Pradhan, etc.*[1], on May 8, 1959. It is because the true effect of this section was not appreciated by the appellants that the present difficulty has arisen.

Not knowing that they were entitled to the benefits of the relevant provisions of the Factories Act by virtue of section 70 of the Bombay Shops and Establishments Act, the representative union of the appellants raised an industrial dispute by a notice on September 20, 1949, claiming some of the amenities provided by the Factories Act (Ref. (IC) No. 192 of 1949). While delivering its award on this reference on November 25, 1950, the Full Bench of the Industrial Tribunal observed that the employees did not appear to be covered by the Factories Act and on that basis it awarded to them a nine-hour day, two holidays per month and a limited provision for overtime wages. It is clear that this award proceeded on the assumption that the relevant provisions of the Factories Act did not apply to the appellants. On May 2, 1952, the appellate decision delivered by the Chief Judge of the Court of Small Causes, in the case of *Ruby Mills*[2], however, construed section 70 of the Bombay Shops and Establishments Act and held that the employees falling under the provisions of the said section were entitled to claim overtime wages under section 59 of the Factories Act. In other words, this decision for the first time properly construed section 70 of the Bombay Act and held that the said section in substance extended the provisions of section 59 of the Factories Act to the employees covered by section 70.

When the appellants' union came to know about this decision it moved the Minister of Labour, Bombay, on October 30, 1952 and requested him to persuade the Ahmedabad mills to extend the benefits of the Factories Act to their Watch and Ward staff; on November 1, 1952, the union received a reply from the Minister stating that he had drawn the attention of the Factori s Department to the judgment in the *Ruby Mills' case*[2]. Thereafter the secretary of the union requested the Chief Inspector of Factories, Ahmedabad, to enforce the above decision in Ahmedabad. Subsequent correspondence followed between the union, the factory authorities and the Mill-Owners' Association, Ahmedabad. In May, 1953, the Mill-Owners' Association accepted the position that the appellants were covered by the Factories Act, and in July, 1953, the appellants were for the first time paid for overtime at the rate provided under the Factories Act. Some mills paid the overtime wages with effect from January, 1953; some from May, 1953 and some from July, 1953.

In August, 1953, the secretary of the new union, which the appellants had joined in the meanwhile, wrote to the employers requesting them to pay overtime wages for the prior period ; and when this request did not receive a sympathetic response from the employers the present applications were filed before the authority making a claim for overtime wages for the period already mentioned.

In their applications for the condonation of delay the appellants alleged that they had *bona fide* believed that neither the Factories Act nor the Bombay Shops and Establishments Act applied to the Watch and Ward staff, and so they had moved the Industrial Court for redress of their grievances. The step thus taken by the appellants shows that in asserting their rights they were exercising due diligence and care. The employers conceded the position that the appellants were entitled to claim overtime wages only in May 1953, and then the appellants tried to negotiate with

1. Civil Appeals Nos. 131 to 304 of 1957.
2. *Vide* Bombay Labour Gazette, January 1935, Vol. 32, No. 5, page 521.

them for the payment of the overtime wages claimed in the present applications. It is on these grounds that the appellants prayed that the delay made in presenting the claim should be condoned.

This claim was resisted by the employers on two grounds; it was urged by them that the main ground alleged by the appellants for claiming condonation of delay amounted to a plea of ignorance of law and that ignorance of law cannot be a sufficient cause under the relevant proviso. It was also contended that no sufficient or satisfactory reason had been given by the appellants for the delay made by them in filing the present applications subsequent to May 2, 1952, when section 70 of the Bombay Act had been authoritatively considered by the appellate Court in the case of *Ruby Mills*[1], and so the employers argued that the appellants were not entitled to ask for condonation of delay.

The authority upheld both these contentions raised by the employers. It considered the judicial desisions cited before it and held that even if the appellants were ignorant of the rights that they got under section 70 of the Bombay Act such ignorance of law cannot be said to be a sufficient cause. It also examined the conduct of the appellants subsequent to the date of the decision in the *Ruby Mills' case*[1] and held that the said conduct did not justify the appellants' claim that they were acting *bona fide* and with due diligence in asserting their rights. In dealing with this latter question the authority observed that the appellants did not specify when they came to know about the decision in the case of *Ruby Mills*[1], and no satisfactory explanation had been given by them as to why, immediately after coming to know of the said decision, they did not move the authority. The authority also examined the correspondence that passed between the parties after the decision in the *Ruby Mills case*[1], and found that the appellants were even then claiming the benefit of the Factories Act prospectively and not retrospectively. In the absence of any affidavit explaining the conduct of the appellants after May 2, 1952, when the *Ruby Mills case*[1], was decided, the authority came to the conclusion that the inaction of the appellants was not at all satisfactorily explained, and so no sufficient cause could be said to have been shown by them to justify the condonation of delay. As a result of these two findings the authority refused to excuse delay, and so the claim made by the appellants for overtime wages for a period beyond the prescribed period of limitation was rejected.

When this decision was challenged by the appellants before the High Court by their petitions under Articles 226 and 227 apparently the only point urged before the High Court was that the authority was in error in holding that an error of law cannot be a sufficient cause under the relevant proviso to section 15 (2) of the Act. It does not appear that the attention of the High Court was drawn to the second finding made by the authority, and so, that aspect of the matter has not been considered in the judgment of the High Court. Dealing with the point raised before it the High Court agreed with the view taken by the authority, and held that ignorance of law cannot constitute a sufficient cause. " Ignorance of law ", observed the High Court,

> "is ignorance of the rights of a party which the law confers upon him, whereas mistake of law is mistake in establishing those rights by, for instance, going to one forum instead of another.'"

The High Court has observed that in cases where there is a mistake of law Courts have almost uniformly taken the view that the time taken up by asserting in a wrong Court or a wrong forum should be excused, and in coming to this conclusion they had been largely influenced by the principle underlying section 14 of the Limitation Act. That is how the petitions filed by the appellants in the High Court were dismissed.

Before dealing with the merits of the contentions raised by Mr. Phadke in the present appeals it is necessary to read the relevant provisions of section 15 of the Act. Section 15 (1) provides for the appointment of the authority to hear and decide for any specified area all claims arising out of deductions from the wages, or delay in

1. *Vide* Bombay Labour Gazette, January, 1953, Vol. 32, No. 5, page 521.

payment of the wages of persons employed or paid in that area. Sub-section (2) provides *inter alia* that if any deduction has been made from the wages of an employed person contrary to the provisions of the Act or any payment of wages has been delayed, such person may apply to such authority for a direction under sub-section (3). It is under this sub-section that the present applications have been made. The First proviso to sub-section (2) prescribes limitation, and says that every such application shall be presented within six months from the date on which the cause of action accrued. It is the Second proviso with which we are directly concerned in the present appeals. This proviso lays down further that any application may be admitted after the said period of six months when the applicant satisfies the authority that he had sufficient cause for not making the application within such period. The pincipal question which has been agitated in the High Court and before the authority was whether ignorance of law can be said to constitute sufficient cause within the meaning of this proviso.

Mr. Phadke contends that this proviso confers wide discretion on the authority and Legislature has deliberately not circumscribed or regulated in any manner the exercise of the said discretion. He concedes that it has to be exercised judicially but he protests against the imposition of any rigid rule, or, as he called it, self-denying ordinance, by which the authority would invariably refuse to treat ignorance of law as falling within the expression "sufficient cause" under the proviso. According to him there is no rule in India that ignorance of law cannot be a sufficient cause for explaining the delay made in instituting legal proceedings; and he strongly urged that even if such a rule applies to ordinary legal proceedings it would be singularly inappropriate in the interpretation of the provisions of welfare legislation like the Act.

In support of this argument Mr. Phadke has invited our attention to the decision of the House of Lords in *Hyman and another* v. *Rose*[1], as well as the decision of this Court in *Namdeo Lokman Lodhi* v. *Narmadabai and others*[2]. Both these decisions dealt with the question of the discretion vested in the Courts to grant relief against forfeiture, and Mr. Phadke's argument was that the relevant words used in that behalf in conferring discretion on the Courts have been construed in their widest denotation and are similar to those in the proviso with which we are concerned ; and so the same construction should be adopted in interpreting it. He has also strongly relied on the decision of the Privy Council in *Brij Indar Singh* v. *Kanshi Ram and others*[3], where their Lordships have considered the trend of judicial decisions in India which interpreted section 5 of the Indian Limitation Act, 1908, and have observed that there appeared to be a uniform practice in the Indian High Courts under which a mistake in law was in proper cases treated as sufficient cause for execusing delay. " Now if the matter were entirely open", said Lord Dunedin in delivering the judgment of the Board,

> " inasmuch as a mere mistake in law is not *per se* sufficient reason for asking the Court to exercise its discretion under section 5, there would be a good deal to be said in argument in favour of making the rule universal........But the matter is not open. To interfere with a rule which after all is only a rule of procedure which has been laid down as a general rule by Full Benches in all the Courts of India, and acted on for many years, would cause great inconvenience, and their Lordships do not purpose so to interfere."

Mr. Phadke argues that this decision is an authority for the proposition that in a proper case a mistake of law or ignorance of law may constitute a sufficient cause under section 5 of the Limitation Act, and, according to him, the same principle should apply in construing the proviso in question. We do not propose to deal with this argument because, as we will presently point out, we have come to the conclusion that the appellants would fail even if we were to uphold Mr. Phadke's present contention.

As we have already noticed the authority has held against the appellants on two grounds, one that ignorance of law cannot be a sufficient cause, and second that,

1. L.R. (1912) A.C. 623.
2. (1953) S.C.J. 306 : (1953) 1 M.L.J. 715 : (1953) S.C.R. 1009 at 1027.
3. (1917) L.R. 44 I.A. 218 : 33 M.L.J. 486 (P.C.).

even if it was, in fact, the appellants had not explained the delay made by them in making the present applications after they knew of the decision in the case of *Ruby Mills*[1] on May 2, 1952. This latter conclusion is a finding on a question of fact and its propriety or validity could not have been challenged before the High Court and cannot be questioned before us in the present appeals. Unfortunately it appears that the attention of the learned Judges of the High Court was not drawn to this finding; otherwise they would have considered this aspect of the matter before they proceeded to deal with the interesting question of law raised before them.

Mr. Phadke fairly conceded that he could not effectively challenge the finding of the authority that no satisfactory explanation had been given for the delay in question. He, however, argued that the said finding would not affect the final decision because, according to him, once it is held that ignorance of law can be a sufficient cause, then the period until May 2, 1952, would be covered by the appellant's ignorance about the true scope and effect of the provisions of section 70 of the Bombay Shops and Establishments Act. This position may be conceded. It is true that the true effect of the said section was not appreciated by either the workmen and their union or the employers or the authorities under the Factories Act, or even by the industrial Courts. But the question still remains whether the appellants are not required to explain the delay made by them after May 2, 1952. Mr. Padke says that it is not necessary for his clients to explain this delay. His argument is that what the relevant proviso really means is that if sufficient cause has been shown for not making the application within the prescribed period of six months then the application can be made any time thereafter. The statutory bar created by the prescribed limitation is removed once it is shown that there was sufficient cause for not making the application within the said period ; and once that bar is removed, there is no further question of limitation and the applicant cannot be called upon to explain the subsequent delay. That is the effect of the argument urged by Mr. Phadke on the relevant proviso.

This argument is substantially founded on the decision of the Court of Appeal in *Lingley* v. *Thomas Firth & Sons, Ltd.*[2]. In that case the Court had to construe the words "reasonable cause" used in proviso (*b*) to section 2, sub-section (1) of the Workmen's Compensation Act, 1906 (6 Edw. 7, C. 58). Section 2 (1) prescribes a limitation of six months for the making of a claim for compensation arising out of an accident caused to the workman falling within its purview, and proviso (*b*) lays down that the

> " failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom or other reasonable cause."

In the case of *Lingley*[2], the claim had been admittedly made beyond the period of six months and within a couple of months thereafter an application for arbitration for compensation was filed. The County Court Judge was satisfied that there was reasonable cause within section 2, sub-section (1) for the applicant's failure to make a claim within the prescribed period, and he held that when once the bar to the proceedings had been surmounted by the establishment of reasonable cause, there was no further limited period within which the claim must be made. Accordingly compensation was awarded to the applicant. The employer appealed against this award and his appeal was allowed. The Court of Appeal reversed the finding of the County Court Judge on the first point and held that for the applicant's failure to make the claim within six months she had not shown any reasonable cause, and that naturally led to the reversal of the award. Even so, in considering the question of the construction of section 2 (1), proviso (*b*), the learned Judges observed that if sufficient cause had been established by the applicant she would have succeeded in obtaining compensation, because they agreed that, if the bar imposed by the statutory period of six months prescribed for the making of the claim had been raised, the claim of the applicant could not be subjected to any further bar of limitation. It is this view on which

1. Vide *Bombay Labour Gazette*, January, 1953, Vol. 32, No. 5, p. 521.
2. L.R. (1921) 1 K.B. 655.

Mr. Phadke relies, and he contends that the same principle should be applied in construing the relevant proviso to section 15 of the Act. In this connection Mr. Phadke has invited our attention to three Indian decisions—*J. Hogan* v. *Gafur Ramzan*[1], *Salamat* v. *Agent, East Indiam Railway*[2], and *Kamarhatti Co., Ltd.* v. *Abdul Samad*[3]. These decisions were concerned with claims for compensation made under section 10 of the Workmen's Compensation Act, VIII of 1923, the first two under section 10 as it stood prior to its amendment in 1938, and the last one under the said section as it was amended in 1938. It may be added that all the three decisions purport to adopt the view taken by the Court of Appeal in the case of *Lingley*[4].

Now in order to appreciate the effect of the decision in the case of *Lingley*[4] it would be relevant to emphasise that in that case the Court of Appeal was really giving effect to an earlier decision of the House of Lords in *Powell* v. *The Main Colliery Co., Ltd.*[5], and, as the judgments of all the learned Judges indicate, they were following the said decision with some reluctance. In the case of *Powell*[5], the House of Lords had held that the claim for compensation specified in section 2 (1) of the English Act does not mean initiation of the proceedings before the tribunal by which compensation is to be assessed, but a notice of claim of compensation sent to the workman's employer. In other words, according to that decision, the limitation of six months prescribed by section 2 (1) applies to the notice of claim which a workman has to give to his employer; it had no reference to the proceedings which a workman would institute before the tribunal claiming to recover the said compensation. The notice of claim had to be served on the employer within six months after the date of the accident, and after serving such notice proceedings had to be initiated before the tribunal claiming compenstion. The effect of the two English decisions, therefore, is that if a workman shows sufficient cause for the delay made by him in serving the notice of claim on the employer there was no question of calling upon him to explain any further delay made by him in instituting the proceedings before the tribunal for the recovery of compensation. In fact, for the institution of such proceedings there was no statutory limitation at all.

Let us now tern to section 10 of our Wokmen's Compensation Act. Section 10 (1) as it originally stood prescribed a period of six months for the making of the claim for compensation. It also required that notice of the accident had to be given as soon as practicable after the happening thereof and before the workman had voluntarily left the employment in which he was injured. The second proviso to section 10 (1) lays down that the Commissioner may admit and decide any claim to compensation notwithstanding that the notice had not been given or the claim had not been instituted in due time as provided by the sub-section if he is satisfied that the failure so to give notice or to institute the claim as the case may be was due to sufficient cause. It appears that in construing the material terms of this proviso it was thought that the position under the proviso was similar to the position under the proviso (*b*) of section 2 (1) of the English Act. It is open to argument whether that is really so ; but, in any case, after section 10 was amended in 1938 the position is clearly different and distinguishable from the position of the English section. The relevant proviso under the amended section lays down that a Commissioner may entertain and decide any claim for compensation in any case notwithstanding that notice has not been given, or the claim has not been preferred before it in due time as provided by section 10, sub-section (1) if he is stisfied that the failure so to give the notice or prefer the claim as the case may be was due to sufficient cause. It is significant that section 10 (1) requires the notice of accident to be given as soon as practicable and the claim to be preferred before the Commissioner within six months. This period has subsequently been enlarged to a period of one year ; but that is another matter. Thus the position under section 10 as amended clearly is that the six months' limitation has been prescribed for

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1. 35 Bom.L.R. 1143.
2. I.L.R. (1938) 2 Cal. 52 at 58.
3. (1952) 1 L.L.J. 490 at 492.
4. L.R. (1921) 1 K.B. 655.
5. L.R. (1900) A.C. 366.

preferring the application for compensation before the Commissioner; and so there can be no analogy between the limitation thus prescribed and the limitation prescribed by section 2 (1) of the English Act. With respect, we may add that in the case of *Kamarhatti Co., Ltd.*[1], where the learned Judges held that the decision in *Lingley's case*[2], was applicable to the case before them, their attention was not drawn to the material change made by the amendment of section 10 of the Indian Act. But the view expressed by the Court in that case on the point of law is clearly *obiter*. The actual decision was that no sufficient cause had been shown by the claimant even on the liberal construction of the proviso, and so the order directing the employer to pay compensation to his workmen was set aside. Thus it would be clear that the decisions on which Mr. Phadke founds his argument were concerned with a statutory provision as to limitation which is essentially different from the provision made by the proviso with which we are concerned.

The proviso with which we are concerned has prescribed the limitation of six months for the institution of the application itself, and so the principle laid down in *Lingley's case*[2], can have no application to the question which we have to decide. Indeed, the present proviso is in substance similar to the provision in section 5 of the Limitation Act, and Mr. Phadke has fairly conceded that there is consensus of judicial opinion on the question of the construction of section 5. It cannot be disputed that in dealing with the question of condoning delay under section 5 of the Limitation Act the party has to satisfy the Court that he had sufficient cause for not preferring the appeal or making the application within the prescribed time, and this has always been understood to mean that the explanation has to cover the whole of the period of delay. (Vide *Ram Narain Joshi* v. *Parmeswar Narain Mahta and others*)[3]. Therefore the finding recorded by the authority that the appellants have failed to establish sufficient cause for their inaction between May 2, 1952, and the respective dates on which they filed their present applications is fatal to their claim. That is why we think it unnecessary to consider the larger question of law which Mr. Phadke sought to raise before us.

We would like to add that the learned Attorney-General had raised a preliminary objection against the validity of the certificate granted by the High Court in the present appeals. He wanted to urge that the High Court was in error in considering the total value of the consolidated appeals for the purpose of granting certificate under Article 133. We have, however, not thought it necessary to consider this argument.

The result is the appeals fail and are dismissed. The respondent has fairly not pressed for his costs, and so we direct that the parties should bear their own costs in this Court. No order as to Court-fees.

Appeals dismissed.

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1. (1952) 1 L.L.J. 490 at 492.
2. L.R. (1921) 1 K.B. 655.
3. (1903) I.L.R. 30 Cal. 309.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. SUBBA RAO, K. C. DAS GUPTA AND J. C. SHAH, JJ.

The State of Jammu and Kashmir and others .. *Appellants**

v.

Thakur Ganga Singh for self and on behalf of other shareholders of M/s. Jammu and Kashmir Mechanics and Transport Workers Co-operative Society, Limited and another .. *Respondents.*

Constitution of India (1950), *Article* 132—*Law as to interpretation of Article* 14 *well-settled—Application to facts of the case—Does not raise " substantial question of law "—Special Leave when granted.*

Where the only question round which the dispute centred was whether an impugned rule stood the test of reasonable classification Special Leave under Article 132 (2) of the Constitution cannot be granted. Under Article 132 (2) there is no scope for granting Special Leave unless two conditions are satisfied: (1) the case should involve a question of law as to the interpretation of the Constitution; and (ii) the said question should be a substantial question of law. The principle underlying the Article is that the final authority of interpreting the Constitution must rest with the Supreme Court. Where the parties agree on the true interpretation of an Article (for instance Article 14) or do not raise any question in respect thereof, it is not possible to hold that the case involves any qsuestion of law as to the interpretation of the Constitution. A series of decisions of the Supreme Court has evolved the doctrine of classification on an interpretation of Article 14. The interpretation of Article 14 in the context of classification has been finally settled by the highest Court of this land and under Article 141 of the Constitution that interpretation is binding on all the Courts within the territory of India. What remained to be done by the High Court was only to apply that interpretation to the facts before it. A substantial question of law, therefore, cannot arise where the law has been finally and authoritatively settled by the Supreme Court.

Appeal by Special Leave from the Judgment and Order, dated the 20th June, 1958, of the Jammu and Kashmir High Court in Writ Petition No. 108 of 1958.

H. N. Sanyal, Additional Solicitor-General of India and *N. S. Bindra*, Senior Advocate (*R. H. Dhebar* and *T. M. Sen*, Advocates, with them), for Appellants.

R. K. Garg and *M. K. Ramamurthy*, Advocates and *S. N. Andley*, *J. B. Dadachanji*, *Rameshwar Nath* and *P. L. Vohra*, Advocates of *Messrs. Rajinder Narain & Co.*, for Respondents.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by Special Leave raises the question of the scope of Article 132 (2) of the Constitution.

The first respondent is one of the shareholders of the second respondent, M/s. Jammu and Kashmir Mechanics and Transport Workers Co-operative Society Ltd., Jammu (hereinafter called the Society). The Society was registered under the Jammu and Kashmir Co-operative Societies Act No. VI of 1993 (Vikrimi). They put in a number of applications before the third appellant for the grant of stage carriage and public carrier permits to them for various routes in the State of Jammu and Kashmir, but no permits were granted to them on the ground that under rule 4-47 of the Jammu and Kashmir Motor Vehicles Rules (hereinafter called the Rules) service licence could only be issued to a person or a company registered under the Partnership Act and that, as the Society was neither a person nor a partnership, it was not entitled to a licence under the Rules. The respondents filed a petition in the High Court of Jammu and Kashmir under section 103 of the Constitution of Jammu and Kashmir challenging the vires of rule 4-47 of the Rules. To that petition the appellants herein, *viz.*, the Government of Jammu and Kashmir State, the Transport Minister, the Registering Authority and the Traffic Superintendent, were made party-respondents. The High Court held that the said rule was *ultra vires* as offending Article 14 of the Constitution, and, on that finding, directed a writ of *mandamus* to issue against the appellants herein from enforcing the provisions

*Civil Appeal No. 217 of 1959. 26th November, 1959.

of the said rule. The appellants filed an application in the High Court for a certificate under Article 132 (1) of the Constitution, but the High Court rejected it on the ground that no substantial question of law as to the interpretation of the Constitution was involved in the case. Thereafter the appellants applied for Special Leave under Article 132 (2) of the Constitution and this Court granted the same. The order giving the Special Leave expressly granted liberty to the respondents herein to raise the question of the maintainability of the appeal at its final hearing.

Learned counsel for the respondents raises a preliminary objection to the maintainability of the appeal. Shortly stated his objection is that under Article 132 (2) of the Constitution Special Leave can be given only if the Supreme Court is satisfied that the case involves a substantial question of law as to the interpretation of the Constitution, that in the present case the interpretation of Article 14 of the Constitution has been well-settled and put beyond dispute by a series of decisions of this Court, that, therefore, no question of law as to the interpretation of the Constitution, much less a substantial question of law in regard to that matter, arises for consideration and that, therefore no Special Leave can be granted under the said Article.

This argument is sought to be met by the learned Additional Solicitor-General in the following manner: Whenever a question of classification is raised, it involves the interpretation of Article 14 of the Constitution with reference to the classification impugned. To state it differently, the argument is that the question in each case is whether the classification offends the principle of equality enshrined in Article 14. Therefore, whether a registered firm, a limited company and a person have equal attributes is a question of interpretation of Article 14 of the Constitution.

Before considering the validity of the rival contentions it would be convenient to ascertain precisely what was the question raised in the High Court and what was the decision given thereon by it. The argument advanced before the High Court on behalf of the Society was that under rule 4-47 a licence can be issued only to a person or a firm registered under the Partnership Act and not to a corporation registered under the Co-operative Societies Act or otherwise, and, therefore, the said rule, being discriminatory in nature, offends Article 14 of the Constitution. The learned Advocate-General appearing for the appellants contended that under Article 14 of the Constitution rational classification is permissible and the Legislature has framed the impugned rule on such a basis, the object of which is to safeguard the interest of the public. The High Court, after considering the rival arguments, expressed the opinion that the said rule did not proceed on any rational basis of classification and that, as a corporation had been arbitrarily singled out for discriminatory treatment, the impugned rule offended the equality clause of the Constitution. The appellants in their petition for Special Leave filed in this Court questioned the correctness of the conclusion of the High Court. They asserted that the said rule was based upon reasonable classification and therefore could not be struck down as repugnant to Article 14 of the Constitution. In other grounds they elaborated the same point in an attempt to bring out the different attributes of the two classes affording an intelligible differentia for classification. They clearly posed the question proposed to be raised by them in the appeal as under :

Ground (iv): "The aforesaid rule 4-47 (of the Motor Vehicles Rules) is based upon reasonable classification and is and was perfectly *intra vires* and valid and could not be struck down as repugnant to Article 14 of the Constitution of India."

Ground (vi): "There is a marked difference between a corporate body and partnership registered under the provisions of the Partnership Act and these points of difference provide an intelligible differentia for classification. The Hon'ble High Court has only referred to one point of difference and has overlooked other points of distinction and has erred in striking down the aforesaid rule 4-47."

Ground (viii): "Rule 4-47 was framed in the light of local conditions prevaling. Co-opetative Societies and Corporations in the matter of transport were not considered to be proper objects for the grant of licence or permit. The classification is rational and reasonable. The exclusion of artificial persons from the ambit of the Rule is natural and not discriminatory."

The other grounds are only a further clarification of the said grounds. In Part II of their statement of case the appellants stated as follows :

> "It is now well-established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation."

The respondents, in their statement of case, accepted the said legal position but contested the position that there was reasonable classification. It is therefore manifest that throughout there has never been a controversy between the parties in regard to the interpretation of Article 14 of the Constitution, but their dispute centered only on the question whether the impugned rule stood the test of reasonable classification.

In the premises, can Special Leave be granted to the appellants under Article 132 (2) of the Constitution ? Article 132 (2) reads :

> "Where the High Court has refused to give such a certificate the Supreme Court may, if it is satisfied that the case involves a substantial question of law as to the interpretation of the Constitution, grant Special Leave to appeal from such judgment, decree or final order."

Under clause (2) of Article 132 there is no scope for granting a Special Leave unless two conditions are satisfied : (i) the case should involve a question of law as to the interpretation of the Constitution ; and (ii) the said question should be a substantial question of law. The principle underlying the Article is that the final authority of interpreting the Constitution must rest with the Supreme Court. With that object the Article is freed from other limitations imposed under Articles 133 and 134 and the right of appeal of the widest amplitude is allowed irrespective of the nature of the proceedings in a case involving only a substantial question of law as to the interpretation of the Constitution.

What does interpretation of a provision mean ? Interpretation is the method by which the true sense or the meaning of the word is understood. The question of interpretation can arise only if two or more possible constructions are sought to be placed on a provision—one party suggesting one construction and the other a different one. But where the parties agree on the true interpretation of a provision or do not raise any question in respect thereof, it is not possible to hold that the case involves any question of law as to the interpretation of the Constitution. On an interpretation of Article 14, a series of decisions of this Court evolved the doctrine of classification. As we have pointed out, at no stage of the proceedings either the correctness of the interpretation of Article 14 or the principles governing the doctrine of classification have been questioned by either of the parties. Indeed accepting the said doctrine, the appellants contended that there was a valid classification under the rule while the respondents argued contra. The learned Additional Solicitor-General contended, for the first time, before us that the appeal raised a new facet of the doctrine of equality, namely, whether an artificial person and a natural person have equal attributes within the meaning of the equality clause, and therefore, the case involves a question of interpretation of the Constitution. This argument, if we may say so, involves the same contention in a different garb. If analysed, the argument only comes to this : as an artificial person and a natural person have different attributes, the classification made between them is valid. This argument does not suggest a new interpretation of Article 14 of the Constitution, but only attempts to bring the rule within the doctrine of classification. We, therefore, hold that the question raised in this case does not involve any question of law as to the interpretation of the Constitution.

Assuming that the case raises a question of law as to the interpretation of the Constitution, can it be said that the question raised is a substantial question of law within the meaning of clause (2) of Article 132. This aspect was considered by the Federal Court in *T. M. Krishnaswami Pillai* v. *Governor-General in Council*[1]. That

1. (1947-48) 52 C.W.N. (F.R.) 1 : (1947) 2 M.L.J. 400 : 1947 F.L.J. 70 (F.C.).

decision turned upon the provisions of section 205 of the Government of India Act, 1935. The material part of that section says :

Section 205 : "(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Coucil made thereunder. . . . ."

The Madras High Court gave a certificate to the effect that the case involved a substantial question of law as to the interpretation of section 240 (3) of the Government of India Act, 1935. Under section 240 (3) of the said Act, no person who was a member of a Civil Service of the Crown in India or held any civil post under the Crown in India could be dismissed or reduced in rank until he had been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. The High Court, on the facts found, held that the appellant therein had been offered a reasonable opportunity of showing cause within the the meaning of the said section, but gave a certificate under section 205 (1) of the Government of India Act, 1935. In dealing with the propriety of issuing the certificate in the circumstances of that case, Zafrulla Khan, J., speaking on behalf of the Court, concisely and pointedly stated at page 2:

"It was urged before us that the case involved a question relating to the interpretation of sub-section (3) of section 240 of the Act. To the extent to which any guidance might have been needed for the purposes of this case on the interpretation of that sub-section that guidance was furnished so for as this Court is concerned in its judgment in *Secretary of State for India* v. *I.M. Lal*[1]. The rest was a simple question of fact. In our judgment no "substantial question of law" as to the interpretation of the Constitution Act was involved in this case, which could have formed the basis of a certificate under section 205 (1) of the Act."

On the question of interpretation of Article 14 of the Constitution this Court in *Budhan Choudhry* v. *The State of Bihar*[2] explained the true meaning and scope of that Article thus :

" It is now well-established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases : namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be nexus between the basis of classification and the object of the Act under consideration."

This is only a restatement of the law that has been enunciated by this Court in *Chiranjit Lal Chowdhuri* v. *The Union of India*[3], and in other subsequent decisions. The said principles were re-affimed in the recent decisions of this Court in *Ram Krishna Dalmia* v. *Justice Tendolkar*[4], and in *Mohammed Haneef Qureshi* v. *State of Bihar*[5]. In view of the said decision there is no further scope for putting a new interpretation on the provisions of Article 14 of the Constitution *vis-a-vis* the doctrine of classification. The interpretation of Article 14 in the context of classification has been finally settled by the highest Court of this land and under Article 141 of the Constitution that interpretation is binding on all the Courts within the territory of India. What remained to be done by the High Court was only to apply that interpretation to the facts before it. A substantial question of law, therefore, cannot arise where that law has been finally and authoritatively decided by this Court.

In the result we accept the preliminary objection and dismiss the appeal with costs.

Appeal dismissed.

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1. (1945) F.C.R. 103 : (1945) 2 M.L.J. 270 : 1945 F.L.J. 129.
2. (1955) S.C.J. 163 : (1955) 1 S.C.R. 1045 1049.
3. (1951) S.C.J. 29 : (1950) S.C.R. 869.
4. (1959) S.C.J. 147 : (1959) 1 M.L.J. (S.C.) 67 : (1959) 1 An.W.R. (S.C.) 67 : (1959) S.C. 279.
5. (1958) S.C.J. 975 : 1958 M.L.J. (Cr.) 727 : (1959) S.C.R. 629.

SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. SUBBA RAO, K. C. DAS GUPTA AND J. C. SHAH, JJ.

M/s. Fedco (P.) Ltd., and another .. *Petitioners**

v.

S. N. Bilgrami and others .. *Respondents.*

Imports Control Order (1955), *clause* 9 (*a*)—*Power to cancel licence granted through fraud or misrepresentation—If violative of licensee's rights under Article* 19 (1) (*f*) *and* (*g*) *and Article* 31 *of the Constitution of India,* (1950).

The entire scheme of control and regulation of imports by licenses is on the basis that the license is granted on a correct statement of relevant facts. That basis disappears if grant of the licence is induced by fraud or misrepresentation. Whether the licencee himself or some other party is responsible for the fraud or misrepresentation, the fact remains that in such cases the basis of the grant of licence has disappeared. It will be absolutely unreasonable that such a licence should be allowed to continue. The provision in clause 9 (*a*) of the Imports Control Order, 1955, that a licence may be cancelled, if it is found, after giving a reasonable opportunity to the licensee to be heard, to have been obtained by fraud or misrepresentation is a reasonable restriction in the interests of the general public on the exercise of a fundamental right of a citizen guaranteed under Article 19 (1) (*f*) and (*g*) of the Constitution. The cancellation under clause 9 (*a*) of the Imports Control Order being under a valid law there can be no question of any right under Article 31 of the Constitution having been infringed.

The requirement that a reasonable opportunity of being heard must be given has two elements. The first is that an opportunity to be heard must be given ; the second is that the opportunity must be reasonable. Both these matters are justiciable and it is for the Court to decide whether an opportunity has been given and whether that opportunity has been reasonable.

Where the petitioners were concerned to show that they were not parties to the fraud than to show that there was no fraud practised at all, the omission to give particulars of the fraud or inspection of papers did not deprive the petitioners of a fair chance of convincing the authority that the grounds on which cancellation of licenses was proposed did not exist, or even if they existed, they did not justify cancellation of the licences. Therefore the opportunity that was given was a reasonable opportunity in the instant case.

Per *Subba Rao, J.*—Unless particulars of the fraud were given and documents shown to them it was not possible for the petitioners to know whether a fraud was committed at all and if committed, how it was committed. When they were denied these it is not possible to hold that they had a reasonable opportlnity of being heard in the circumstances.

Petition under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

Purshottam Tricumdas, Senior Advocate (*Porus A. Mehta*, Advocate and *S. N. Andley, J. B. Dadachanji, Rameshwar Nath* and *P. L. Vohra*, Advocates of *Messrs. Rajinder Narain & Co.*, with him), for Petitioners.

C. K. Daphtary, Solicitor-General of India and *N. S. Bindra*, Senior Advocate (*R. H. Dhebar* and *T. M. Sen*, Advocates, with them (for Respondents,).

The Court delivered the following Judgments :—

Das Gupta, J. (For the Majority).—The first petitioner is a Company registered under the Indian Companies Act, having its registered office in Bombay and is engaged in the business of dyes, chemicals, plastics, and various other goods. The second petitioner is the Chairman and a Director of the first petitioner Company. In this petition for enforcement of fundamental rights under the Constitution they pray for the issue of a writ of *certiorari* or other appropriate writ, direction or order quashing an order made by the first respondent, the Chief Controller of Imports and Exports, Government of India, New Delhi, by which he cancelled five import licences which had been granted to the first petitioner by the Joint Chief Controller of Imports and Exports, Bombay. There is also a prayer for an order on the second respondent, the Collector of Customs, Bombay, directing him to assess the goods of the petitioner

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*Petition No. 171 of 1958. 9th December, 1959.

Company which have been landed in Bombay having been imported on the strength of these licences and allow the petitioner company to clear them. Of these five licences, two were dated July 24, 1958, two dated August 16, 1958, and the fifth dated September 4, 1958. The total value of the imports authorised by these five licences was Rs. 25,75,000. The petitioners contended that these five licences were granted to the petitioner Company on five applications sent by them by registered post to the Chief Controller of Imports and Exports, Government of India, New Delhi—three sent on June 17, 1958; one on June 26, 1958; and the last on July 22, 1958. It is further stated that in respect of each of these applications a letter was received by the Company from the office of the Chief Controller of Imports and Exports, Government of India, New Delhi, intimating that their application had been forwarded to the Joint Chief Controller of Imports and Exports, Bombay, with the necessary comments and asking the Company to contact this officer, the Joint Chief Controller of Imports and Exports, Bombay, direct in the matter. The petitioner Company wrote in each case to the Chief Controller of Imports and Exports, New Delhi, acknowledging receipt of these letters and at the same time to the Joint Chief Controller of Imports and Exports, Bombay, requesting that the licences should be issued to them at an early date. After the licences were received by the Company from the office of the Joint Chief Controller of Imports and Exports, Bombay, the Company placed orders for the goods covered by these licences and some of the goods actually arrived at Bombay. Before however any of these goods could be cleared the Company received a notice dated September 24, 1958, stating that whereas there was reason to believe that these five licences had been obtained fraudulently, the Government in the exercise of the powers specified in para. 9 of the Imports Control Order, 1955, proposed to cancel the said licences unless sufficient cause against that was furnished to the Chief Controller of Imports and Exports, New Delhi within 10 days of the date of the issue of the said notice. On September 26, the petitioner Company's solicitors sent a telegram to the Chief Controller of Imports and Exports, New Delhi, requesting him to give particulars of the alleged fraud and to give them an appointment for inspection of papers and documents relied upon by him. On September 27, the Company wrote a letter to the same officer in which they gave a written explanation pointing out various facts and stating that they were victims of foul play by some person interested in causing damage to them and involving their reputation and in order to bring them in bad books with the authorities. In the concluding portion of this letter the Company stated :

> "We also reserve our right to add to, amend or alter the explanations contained in this letter hereafter and to submit such further explanations as may become necessary after taking inspection of all the papers and after getting the particulars of the alleged fraud. We shall thank you to give us also an opportunity of a personal hearing in the matter."

This written explanation was handed over to the first respondent by the Company's representatives at an interview with him on September 30. At that interview also, it is said, the representatives of the Company pointed out to Mr. Bilgrami that in the absence of any particulars of the alleged fraud and without inspection of the papers relied upon by him it was not possible for the petitioners to give a complete explanation and that they reserved their right to give further explanation on getting the said particulars and inspection of the said papers. The Company's representatives had another interview with Mr. Sundaram, Director (Administration), in the Chief Controller's Office on October 14, 1958. At this interview the petitioners again requested Mr. Sundaram to give them particulars and that they might be permitted to inspect the papers. No particulars were however furnished and no inspection was allowed ; but on that very date when they had this interview with Mr. Sundaram the first respondent made the order of cancellation.

The ten grounds set out in clauses A to L of para. 15 of the petition as the basis for the relief resolve on analysis into four only. These are :—

(1) Clause 9 (*a*) of the Import Control Order under which the order of cancellation has been made is itself unconstitutional being violative of the petitioners' rights under Article 19 (1) (*f*) and (*g*) and Article 31 of the Constitution ;

(2) The order of cancellation has been made without compliance with the mandatory requirement of clause 10 of the Imports Control Order to give the licensee " a reasonable opportunity of being heard ".

(3) The first respondent, Mr. Bilgrami, had no authority in law to make any order under clause 9 of the Import Control Order ;

(4) The petitioners have been denied equal protection of laws under Article 14 of the Constitution inasmuch as other persons similarly situated have been given a proper opportunity and a personal hearing before taking any action against them, while the petitioners have been denied a proper opportunity to show cause for the cancellation of licences and personal hearing in the matter.

Of these four grounds, the third ground, *viz.*, that Mr. Bilgrami had no authority in law to make an order under clause 9 of the Imports Control Order was made in apparent ignorance of the fact that the Chief Controller of Imports and Exports, became competent to make an order thereunder in consequence of an amendment made in the Order, in 1958. As the clause originally stood the relevant words were : " The Central Government or any other officer authorised in this behalf may cancel any licence granted under this order....". By the amendment made on February 27, 1958, the words " or the Chief Controller of Imports and Exports " were inserted after the words " the Central Government " in this clause. The position on the relevant dates in September and October, 1958, therefore was that the Chief Controller of Imports and Exports, New Delhi, had authority to cancel any licence granted under the Imports Control Order without being specially authorised in that behalf. It was apparently in view of this position which was pointed out by Mr. Bilgrami in his affidavit in opposition that the learned counsel for the petitioners did not press this ground at all. Nor did he press the fourth ground, *viz.*, that the petitioner's right under Article 14 of the Constitution has been infringed. It is obvious that if the order has been made without the petitioners having been given a reasonable opportunity of being heard that itself would entitle them to the relief prayed for. The question whether or not other persons were given a fair opportunity of being heard is entirely irrelevant.

In opposition to this application, Mr. Bilgrami, the first respondent, contends *inter alia* that the provision or cancellation of a licence under clause 9 of the Order does not contravene any of the fundamental rights granted under Article 19 (1) (*f*) and (*g*) and Article 31 of the Constitution and that the petitioners were given adequate and reasonable opportunity of being heard before the order of cancellation was made. Mr. Bilgrami has stated in the affidavit that while it is true that four applications for licence—three dated June 17, and one dated June 26, 1958, were received in his office, the fact is that all these four applications were rejected, and that it is now found that while these four rejected applications were lying in his office, four similar applications bearing the same dates and containing the same particulars and a fifth application bearing the date July 22, 1958, somehow made their appearance in the office of the Joint Chief Controller of Imports and Exports, Bombay, along with five separate letters, one in respect of each application, containing recommendations for issue of licences purporting to have been issued from the Office of the Chief Controller of Imports and Exports, New Delhi, under the signature of one Shri M. L. Gupta, Deputy Chief Controller of Imports and Exports. The respondent contends that the purported signatures of Shri M. L. Gupta on these letters were not genuine. Mr. Bilgrami also contends that though these letters purported to state that the issue of licences was authorised by him he did not in fact give any authority, and that when the petitioners' representatives interviewed him on September 30, 1958, they were told of the " general nature of the fraud " and that he further told them that the issue of the licences had not been authorised by him as they purpoted to be and that they had been obtained fraudulently. The respondents further contend that when again on October 14, 1958, the petitioners had an interview with Mr. Sundaram, the Director of Administration in the Office of the Chief Controller of Imports and Exports Mr. Sundaram told them expressly

that the recommendations against which the disputed licences were granted to the petitioners were not genuine.

The first contention on behalf of the petitioners is that clause 9 (*a*) of the Import Control Order is itself invalid as it violates a licencee's rights under Article 19 (1) (*f*) and (*g*) and Article 31 of the Constitution. Clause 9 (*a*) is in these words :—

" *Cancellation of Licences.*—The Central Government or the Chief Controller of Imports and Exports or any other officer authorised in this behalf may cancel any licence granted under this order or otherwise render it ineffective :—

(*a*) If the licence has been granted through inadvertence or mistake or has been obtained by fraud or misrepresentation. . . . .".

As in the present case there is no question of the licences having been granted through inadvertence or mistake it is not necessary for us to consider whether the provision for cancellation of licences on the ground that they have been granted through mistake or inadvertence is invalid. The question in the present case is whether the provisions for cancellation of licences on the ground that they have been obtained by fraud or misrepresentation is " a reasonable restriction in the interests of the general public " on the exercise of the petitioners' right under Article 19 (1) (*f*) and (*g*). It has to be noticed first that here is no case of unbridled authority to cancel a licence nor is there any scope for arbitrary action. If a provision for giving a reasonable opportunity of being heard had not been made in the Order itself, it would have been necessary to consider whether this had still to be given because rules of natural justice required it. No discussion about the requirements of the rule of natural justice is however called for here, as clause 10 of the Order provides that no action shall be taken under clauses 7, 8 or 9, unless the Licensee/Importer has been given *a reasonable opportunity of being heard.* It is proper to state that the learned counsel for the petitioners does not attack the validity of the provisions on the ground that it gives unbridled authority to cancel a licence, or that the requirements of natural justice have not been sufficiently fulfilled by clause 10. His argument is that though it may not be unreasonable that a licence should be cancelled if the licensee himself has practised fraud in obtaining it, cancellation is wholly unreasonable if it is made merely on the ground that it has been obtained by fraud, without it being further shown that the licensee himself has been a party to the fraud. It appears to us that in most cases, if not in all cases, where a licence is obtained by fraud or misrepresentation it would be reasonable to think that the person in whose favour the licence has been obtained, cannot but be a party to the fraud or misrepresentation. The petitioners' counsel submitted that it is possible to imagine a case where an enemy of the person in whose favour the licence is granted procures such grant by means of fraud with the deliberate motive of accusing this person later on of fraud and thereby subjecting him on the one hand to criminal prosecution and on the other hand damaging his reputation and ruining his business. It is unnecessary for us to decide in the present case whether this may ever happen. Clearly however the fact that fraud by which the grant of the licences has been induced by an enemy is wholly immaterial on the present question. The entire scheme of control and regulation of imports by licences is on the basis that the licence is granted on a correct statement of relevant facts. That basis disappears if grant of the licence is induced by fraud or misrepresentation. Whether the licensee himself or some other party is responsible for the fraud or misrepresentation, the fact remains that in such cases the basis of the grant of licence has disappeared. It will be absolutely unreasonable that such a licence should be allowed to continue. We are therefore of opinion that the provision that licence may be cancelled, if it is found, after giving a reasonable opportunity to the licensee to be heard, to have been obtained by fraud or misrepresentation is a reasonable restriction in the interests of the general public on the exercise of the fundamental right of a citizen guaranteed under Article 19 (1) (*f*) and (*g*) of the Constitution. The cancellation being under a valid law there can be no question of any right under Article 31 of the Constitution having been infringed.

This brings us to the main contention pressed on behalf of the petitioners, *viz.*' that the licensee has not been given a reasonable opportunity of being heard before

the order of cancellation was made. There can be no doubt that if a reasonable opportunity to be heard as against the proposed order of cancellation has not been given the order would be an unjustified interference with the petitioners' right. It is necessary therefore to examine the material on the record to see whether the petitioners have succeeded in showing that no reasonable opportunity has been given.

The requirement that a reasonable opportunity of being heard must be given has two elements. The first is that an opportunity to be heard must be given; the second is that this opportunity must be reasonable. Both these matters are justiciable and it is for the Court to decide whether an opportunity has been given and whether that opportunity has been reasonable. In the present case, a notice to show cause against the proposed order was given; it was stated in the notice that the ground on which the cancellation was proposed was that the licences had been obtained fraudulently; and later on, a personal hearing was given. It must therefore be held that the requirement that an opportunity to be heard must be given was satisfied. What the petitioners' counsel strenuously contends however is that though an opportunity was given that opportunity was not reasonable. In making this argument he had laid special stress on the fact that particulars of the fraud alleged were not given and an opportunity to inspect the papers though repeatedly asked for was not given. It is now necessary to consider all the circumstances in order to arrive at a conclusion whether the omission to give particulars of fraud and inspection of papers deprived the petitioners of a reasonable opportunity to be heard.

There can be no invariable standard for "reasonableness" in such matters except that the Courts conscience must be satisfied, that the person against whom an action is proposed has had a fair chance of convincing the authority who proposes to take action against him that the grounds on which the action is proposed are either non-existent or even if they exist they do not justify the proposed action. The decision of this question will necessarily depend upon the peculiar facts and circumstances of each case, including the nature of the action proposed, the grounds on which the action is proposed, the material on which the allegations are based, the attitude of the party against whom the action is proposed in showing cause against such proposed action, the nature of the plea raised by him in reply, the requests for further opportunity that may be made, his admissions by conduct or otherwise of some or all the allegations and all other matters which help the mind in coming to a fair conclusion on the question. The action proposed in the present case, *viz.*, the cancellation of the five licences was proposed on a tentative conclusion by Mr. Bilgrami on the basis of the material in his possession that the five licences had been obtained fraudulently. The main grounds on which this tentative conclusion appears to have been based were that four applications—three dated June 17 and one dated June 26, 1958, similar in all particulars to the four which are now found in the office of the Joint Controller of Imports and Exports, Bombay, had been actually received but had been rejected and were lying in the Chief Controller's Office; that four similar applications, bearing the same dates and same particulars which were lying in the Bombay Office and also a fifth application dated July 22, were accompanied by five forwarding letters purporting to have been signed by Mr. M. L. Gupta recommending the prayer for licence and containing a statement that the first respondent had authorised such issue of licences on those applications but these signatures purporting to have been of Mr. M. L. Gupta were not really his signatures; that while the forwarding letters purported to state that the issue of these licences prayed for had been authorised by Mr. Bilgrami as the Chief Controller of Imports and Exports, New Delhi, he himself knew that such issue had not been authorised by him. We find that in the very notice that was given to the petitioners' company to show cause against the proposed action of cancellation, it was stated that these licences appeared to have been obtained by fraud. On the question of particulars of fraud, it has been stated by the first respondent in his affidavit that at that stage no particulars of the fraud could be given by him as they were unknown to him, but that he did inform the petitioners' representives—Mr. Parikh, a Director of the Company, the second petitioner, Mr. Rangwala, who is the Chairman of the Company and the Company's

solicitor, Mr. Hussaini Doctor of the "general nature of the fraud". In para. 23 of his affidavit Mr. Bilgrami has made the following statement :—

"I say that the Director of the pettioners' Company, Shri B. K. Parekh and Shri Rangwala and their attorney's partners, Mr. Huseini Doctor saw me on the 30th September, 1958. I told them that the issue of the licences had not been authorised by me as they purported to be and that they had been obtained fraudulently, though at that stage I was unable to say how exactly and by whom the fraud was committed. As also the investigation by the Police was already in progress, it was not possible to give minute particulars of the fraud. When the petitioners were told as above, the petitioners' chairman started raising contentions suggesting that the fraud might have been committed by reason of the Gujarati Maharashtrian and anti-Muslim feelings amongst the employees of his firm."

The affidavit in reply was sworn by Rangwala himself. We find therein repeated denials of Mr. Bilgrami's assertion that the Company's representatives were told of the "general nature of the fraud". It is worth noting, however, that as regards the categorical statement made in para. 23 as to what Mr. Bilgrami told Mr. Rangwala and others and what they told him there is no clear denial. Dealing with para. 23 of Bilgrami's affidavit in para. 20 of his own affidavit in reply. Rangwala after saying that the first respondent's statement does not say anything as to how exactly and by whom the fraud was committed but simply added that the first respondent did not say anything beyond the fact that the licences had been obtained by fraud. It is significant that no specific denial was made of Mr. Bilgrami's assertion that to Mr. Rangwala, Mr. Parekh and Mr. Huseini Doctor he had himself stated that the "issue of the licences had not been authorised by him as they purported to be". No less important is the fact that Rangwala does not deny the assertion made by Mr. Bilgrami that he (Mr. Rangwala) in the course of that interview on September 30, suggested that the fraud might have been committed by reason of certain feelings amonst the employees of his firm. It is reasonable therefore to believe that besides stating that the licences had been obtained fraudulently, Bilgrami definitely informed the Company's representatives on September 30, 1958, that though issue of the licences had been purported to be authorised by him—with apparent reference to the forwarding letters recommending the issue of the licences—this had not actually been authorised and further that on receipt of this information the Company's representatives instead of saying that no fraud had been practised and that Mr. Bilgrami was making a mistake in thinking that he had not authorised the issue of the licences and that perhaps his memory had failed him took refuge behind the plea that it was not the Company but some enemy of the Company who had perpetrated the fraud.

The petitioners' representatives had also an interview with Mr. Sundaram on October 14, 1958. While we have not got any statement of Mr. Sundaram himself as to what happened in that interview we find apart from Mr. Bilgrami's affidavit in para. 24 that Mr. Sundaram also informed the petitioners' representatives at that interview that the recommendations against which the disputed licences were granted to the petitioners were not genuine, (which assertion was repeated in slightly different words in para. 29) the fact that the first respondent's letter, dated December 18, 1958, a copy of which Mr. Rangwala annexed to his affidavit in reply concluded with the following words :—

"It may be stated that the fact that the following letters referred to above were not genuine were mentioned to the representatives of your firm when they interviewed Shri D. R. Sundaram, Director, (Administration) on 14th October, 1958."

Though annexing a copy of this letter to his affidavit in reply Mr. Rangwala did not state that this statement in the concluding portion of the letter was not true. This justifies the conclusion that Mr. Bilgrami's assertion that Mr. Sundaram told the Company's representatives that the forwarding letters containing the recommendations on the basis of which the licences had been issued were not genuine is true. Mr. Bilgrami's statement in para. 29 of his affidavit is that when Mr. Sundaram informed the Company's representatives of this they had no explanation to give. Dealing with para. 29 of this affidavit in para. 23 of his own affidavit Mr. Rangwala

did not state that Mr. Sundaram did not tell them that the licences issued were on the basis of documents which were not genuine, or that on being so told they had no explanation to offer.

On a consideration of the entire background in which the notice for cancellation was issued, what was stated by the petitioners in their letter, dated September 27, and what we find to have taken place at the interviews on the 30th September and the 14th October, specially the fact that the Company's representatives appeared to have been more concerned to show that the Company was not a party to the fraud than to show that there was no fraud practised at all, we are of opinion that the omission to give further particulars or inspection of papers did not derprive the petitioners of a fair chance of convincing Mr. Bilgrami that the grounds on which cancellation of the licences was proposed did not exist, or even if they existed, they did not justify cancellation of the licences. We are, therefore, of opinion that the opportunity that was given to the petitioners in the present case amounted to a reasonable opportunity of being heard against the action proposed.

The petitioners are, therefore, not entitled to any relief.

The petition is accordingly dismissed with costs.

Subba Rao, J.—I have had the advantage of perusing the judgment of my learned brother, Das Gupta, J., I regret my inability to agree with his conclusion.

The facts are fully stated in the judgment of my learned brother and I shall, there fore, briefly restate only the material facts. The first petitioner, M/s. Fedco (Private) Limited (hereinafter called the Company) is a Company registered under the Indian Companies Act having its registered office in Bombay. It is engaged in the business of dyes, chemicals, plastics and various other goods. The second petitioner is the Chairman and a Director of the first petitioner-Company. The Company sent five applications by registered post to the Chief Controller of Imports and Exports, New Delhi, (hereinafter called the Chief Controller). Three of the applications were dated June 17, 1958, one was dated June 26, 1958, and the last was dated July 22, 1958. In the said applications the Company prayed for the issue of import licences to enable them to place orders and import different types of goods from West Germany. In regard to each of these applications, the Company received a letter purporting to be from the office of the Chief Controller intimating them that their applications had been forwarded to the Joint Chief Controller of Imports and Exports, Bombay, (hereinafter called the Joint Controller) with the necessary comments. The Company acknowledged the receipt of these letters. Thereafter five licences were received from the Office of the Joint Controller,Bombay, and two of them were dated July 24, 1958, another two were dated August 16, 1958, and the fifth was dated September 4, 1958. On the basis of the said licences, orders were placed with a foreign company in West Germany and goods of considerable value actually arrived in the Bombay port. By letter dated September 23, 1958, the Joint Controller asked the Company to return the said five licences granted to them without entering into any commitments. After some correspondence between the Company and the Chief Controller, the former received a notice, dated September 24, 1958, from the latter to the effect that the Government had reason to believe that the said licences were obtained fraudulently and therefore they proposed to cancel the said licences unless sufficient cause was shown against such action being taken within ten days of the issue of the said notice. On October 16, 1958, the Company received an undated order from the Chief Controller purporting to cancel the said five licences. The Company and their manager filed the present petition under Article 32 of the Constitution praying for a writ of *certiorari* or other appropriate writ quashing the order of the Chief Controller cancelling the said five licences and directing the Collector of Customs, Bombay, to assess the goods of the Company which had been imported into India and allow them to clear the same.

Mr. Purshottam Trikamdas, learned counsel for the petitioners, in support of his contentions raised before us two points, *viz.*, (1) clauses 9 and 10 of the Imports

Control Order, 1955, (hereinafter called the Order) whereunder the licences were cancelled infringe the fundamental rights of a citizen under Article 19 (1) (*f*) and (*g*) of the Constitution inasmuch as the said provisions constitute an arbitrary and unreasonable restriction on the said rights; and (2) the Chief Controller has not complied with the provisions of clause 10 of the Order as he failed to give the Company reasonable opportunity of being heard before the licences granted to them were cancelled and therefore the act of the Chief Controller in cancelling the licences infringes the rights of the Company under Article 19 (1) (*f*) and (*g*) of the Constitution.

The first point need not be considered as I am clearly of the view that no "reasonable opportunity" within the meaning of clause 10 of the Order was given to the petitioners by the Chief Controller. The material parts of clauses 9 and 10 of the Order read :—

"CLAUSE 9. *Cancellation of Licences.*—The Central Government or any other Officer authorised in this behalf may cancel any licence granted under this Order or otherwise render it ineffective :—

(*a*) if the licence has been granted through inadvertence or mistake or has been obtained by fraud or misrepresentation ;".

CLAUSE 10. *Applicant or Licensee to be heard.*—No action shall be taken under clauses 7, 8 or 9 unless the licencee Importer has been given a reasonable opportunity of being heard."

It is not disputed that the Central Government delegated its powers to act under these clauses to the Chief Controller. The first question is, what is the scope of the enquiry under clause 10 of the Order? Is it purely an administrative act or is it a quasi-judicial act? The criteria to ascertain whether a particular act is a quasi-judicial act or an administrative one have been laid down with clarity by Lord Justice Atkin in *Rex* v. *Electricity Commissioners, Ex Parte London Electricity Joint Committee Co.*[1], elaborated by Lord Justice Scrutton in *Rex* v. *London County Council, Ex Parte Entertainments Protection Association, Ltd.*[2] and authoritatively restated by this Court in *Province of Bombay* v. *Khusaldas S. Advani*[3]. They laid down the following conditions : (*a*) the body of persons must have legal authority ; (*b*) the authority should be given to determine questions affecting the rights of subjects ; and (*c*) they should have a duty to act judicially. All the three conditions are satisfied in this case. Under the said clauses authority is conferred on the Central Government or any other officer authorized in this behalf to cancel any licence granted under the Order and the cancellation of a licence certainly affects the rights of subjects. A clear duty to act judicially is imposed by clause 10 on the said authority. He has to give to the affected party "reasonable opportunity of being heard". It is, therefore, clear that under clauses 9 and 10 of the Order, the Chief Controller performs a quasi-judicial act and is therefore bound to follow the principles of natural justice in cancelling a licence. Clause 10 clearly and without any ambiguity describes the principles of natural Justice by using the three well-known words and phrase, *viz.*, "reasonable", "opportunity" and "of being heard". They imply that when the charge is one of fraud the affected party is entitled to know the particulars of fraud alleged, to inspect the documents on the basis of which fraud is imputed to him and to a personal hearing to explain his case and to absolve himself of the charge made against him. Without these elementary safeguards provided by the authority, the opportunity to be heard given to the licensee becomes an empty formality. With this background I shall scrutinize the relevant facts to ascertain whether any such reasonable opportunity was given to the petitioners in this case. The question falls to be decided only on the affidavits filed by the parties. I shall assume for the purpose of this petition that the affidavit filed by the Chief Controller represents what all had taken place between him and the representatives of the Company. The notice dated September 24, 1958, issued to the petitioners laconically states that the licences granted by the Joint Controller to the Company were fraudulently obtained and therefore it was notified that the Government of India, in exercise of the powers specified in paragraph

1. L.R. (1924) 1 K.B. 171.
2. L.R. (1931) 2 K.B. 215.
3. (1950) S.C.J. 451 : (1950) 2 M.L.J. 703 : (1950) S.C.R. 621.

9 of the Order proposed to cancel the said licences unless sufficient cause against the proposed action was furnished to the Chief Controller within ten days of the date of the issue of the notice. On receipt of the said notice, the petitioner Company sent a telegram through their Solicitors requesting the Chief Controller not to publish the said notification. On September 26, 1958, the Company's Solicitors sent another telegram to the Chief Controller requesting him to give them the particulars of the alleged fraud and to give them an appointment for inspection of papers and documents relied upon by the Chief Controller. On September 27, 1958, the Company sent a letter to the Chief Controller pointing out the relevant facts and stating that the petitioner-Company had accepted the licences honestly and had at no time any reason to doubt the *bona fides* of the grant of the licences to them ; that they suspected that they were victims of foulplay by some persons interested in causing damage to them and to their reputation ; that Mr. B. K. Parekh, a Director of the petitioner-Company, and the Company's Solicitor, Mr. Hooseini Doctor, met the Chief Controller on September 30, 1958, and handed over the explanation to him and also personally told him that in the absence of any particulars of the alleged fraud and without inspection of the papers relied upon by the Chief Controller, it was not possible for the petitioner Company to give a complete explanation and that the petitioners reserved their right to give further explanation on getting the said particulars and inspection of the said papers. They also requested the Chief Controller to give the Company a personal hearing to meet the charges after giving the necessary particulars and the inspection of papers asked for. The Chief Controller told them that the issue of the licences had not been authorized by him as they purported to be and that they had been obtained fraudulently, though at that stage he was not able to say how exactly and by whom the fraud was committed. He also did not give them the particulars of fraud. The Director of the Company suggested that the fraud might have been committed by reason of the Gujarati Maharashtrian and anti-Muslim feeling amongst the employees of the Company. On behalf of the petitioner Company, the Chief Controller was told that it was not possible for the Company to give a complete explanation and that they reserved their right to give further explanation. The petitioners were not allowed inspection of the papers. By their letter dated October 3, 1958, the Company recorded what took place at the said interview and sent it to the Chief Controller. The petitioners again wrote another letter to the Chief Controller reminding him that they had not received any particulars of the alleged fraud. This letter was personally handed over to Mr. Sundaram, the Director of Administration in the Office of the Chief Controller on October 14, 1958. At that interview, Mr. Sundaram told the petitioners that the recommendations against which the disputed licences were granted were not genuine. On October 16, 1958, the Chief Controller cancelled the said five licences issued to the petitioner Company. On the aforesaid facts, which we have assumed for the purpose of this petition, can it be said that the Chief Controller gave the petitioners a "reasonable opportunity of being heard" to enable them to establish that no fraud had been committed in getting the said licences ?

The learned Solicitor-General, appearing for the respondents, contended that the Company admitted the fraud, that their only defence was that the fraud might have been committed by reason of the Gujarati Maharashtrian and anti-Muslim feeling amongst the employees of the Company and that therefore the fact that the Chief Controller told the petitioners that the issue of the licences had not been authorized by him and the fact that Mr. Sundaram told the petitioners on October 14, 1958, that the recommendations against which the disputed licences were granted to the petitioners were not genuine, were, in the circumstances, sufficient disclosure of the particulars of fraud and that, therefore, reasonable opportunity within the meaning of section 25 (1) of the Act had been given to the petitioners. I find it very difficult to accept this argument. The argument assumes that the petitioner-Company accepted the version given by the Chief Controller or by Mr. Sundaram. For the purpose of this petition it must be assumed that the petitioners were innocent. The notice was given to them to show cause why the licences given to them should not be cancel-

led on the ground of fraud. By letters and in person they requested the Chief Controller to give them the particulars of the fraud, and to allow them to inspect the relevant documents so that they might give a further explanation to show cause against the cancellation of the licences. The affidavit filed by the Chief Controller only discloses that he, in his conversation with the Solicitor and the Director of the Company, mentioned to them that he did not issue the licences. In the affidavit he admits that they asked for particulars and for the inspection of the documents ; but he says that the petitioners were told sufficiently what was against them and their demand for the inspection of the papers was mischievous. But what he told them about the particulars of the alleged fraud is, in his own words :—

"I told them that the issue of the licences had not been authorised by me as they purported to be and that they had been obtained fraudulently, though at that stage I was unable to say how exactly and by whom the fraud was committed."

The conversation with Mr. Sundaram on October 14, 1958, does not carry the matter further. He has not been authorized by the Central Government to make an enquiry and the fact that he told the petitioners that the recommendations against which the disputed licences were granted were not genuine, even if true, does not carry the matter any further. The fact, therefore, remains that notwithstanding specific request by the petitioners no particulars were furnished to them, no facilities for inspection of the relevant documents given and no date was fixed for the enquiry in regard to the alleged fraud.

The learned Solicitor-General asked, what was that that the petitioners could have gained if the particulars were given and if they were allowed to inspect the relevant documents ? This is a lopsided way of looking at things. The question should have been, what reasonable opportunity to be heard was given to the petitioners to establish their innocence ? That apart, without apportioning any blame either on the petitioners or on the respondents, many possibilities can be visualized, *viz.*, (i) the petitioners were guilty of fraud ; they knew that their applications were rejected by the Chief Controller, they got similar applications surreptitiously introduced in the Bombay Office with forged recommendations under the signature of the Deputy Chief Controller, New Delhi, Mr. M. L. Gupta, and obtained the licences by practising fraud on the Joint Chief Controller, Bombay ; (ii) a third party, presumably a rival business-man or members of the staff of the Company, evolved a complicated scheme of fraud to cause damage to the Company and their reputation ; the Company's enemies came to know that the applications of the Company were rejected, then forged fresh applications, got them surreptitiously introduced in the Bombay Office and got the licences issued in favour of the petitioners : this is a rather far-fetched theory ; (iii) after the applications were rejected, fresh applications were filed in the New Delhi Office, got forwarded to the Joint Chief Controller, Bombay, with the directions issued by the Deputy Chief Controller, New Delhi ; (iv) the original applications field by the Company were ordered, and not rejected, by the Chief Controller or his Deputy and they were sent in due course along with the recommendations duly signed by the Deputy Chief Controller to the Joint Controller, Bombay, and that the licences were issued in the usual course; the Office of the Chief Controller, New Delhi, after realizing that licences were issued contrary to rules or orders that licences should not be issued in respect of goods to be imported from soft currency areas, set up a false case of the original applications being rejected and the fresh applications substituted in the Bombay Office. The aforesaid are some of the possibilities and there may be many others. When notice was issued to the petitioners on the ground of fraud, they were certainly entitled to the particulars thereof. The Chief Controller could have given the following particulars; (i) the petitioners' applications were rejected on a particular date ; (ii) the orders of rejection were communicated to them on a particular date ; (iii) that he did not issue any letters to the petitioners as regards the forwarding of their applications or the recommendations to the Joint Chief Controller, Bombay ; (iv) after the rejection of their applications, the Office of the Chief Controller did not receive any letters from the petitioners ; (v) that the applications on which the licences were issued were not the same applications sent to the Delhi Office; (vi) that the signature of Mr. M. L. Gupta

was forged and (vii) that there is nothing in the Bombay Office to show that they received any applications from the Delhi Office. If these particulars were given to the petitioners, they might have by inspecting the documents proved that there was no fraud, that there was no order rejecting the applications, that the despatch book showed that the applications were forwarded to the Bombay Office and that the original applications were not in that Office, that the despatch book and the receipt book showed the correspondence that passed between the Chief Controller and the petitioners, and that the signature of Mr. Gupta on the recommendations was genuine. It is not as if the petitioners admitted that they committed the fraud. When they were confronted with the notice, unless the particulars were given to them and the documents shown to them, it was not possible for them to know whether a fraud was committed at all and, if committed, how was it committed. Only for the purpose of explaining that no fraud was committed by them, they asked for the particulars, for inspection of the relevant documents and for a personal hearing ; all these were denied to them. In the circumstances, I find it not possible to hold that the petitioners were given reasonable opportunity of being heard within the meaning of clause 10 of the Order. The stakes are high and the order of cancellation was made arbitrarily and in utter disregard of the principles of natural justice. I should not be understood to have expressed any opinion on the merits of the case. It may be, or it may not be, that the petitioners were guilty of fraud ; but they should have been given a reasonable opportunity of being heard before they were condemned as having committed the fraud and their licences were cancelled. I, therefore, direct the issue of a writ of *certiorari* quashing the order of the Chief Controller cancelling the licences granted to the petitioners.

ORDER.—In accordance with the opinion of the majority the Petition is dismissed with costs.

Petition dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—S. R. DAS, *Chief Justice*, N. H. BHAGWATI AND M. HIDAYATULLAH, JJ.

The Commissioner of Income-tax, West Bengal .. *Appellant**

v.

Kalu Babu Lal Chand .. *Respondent.*

Income-tax Act (XI of 1922), section 10—Karta of Hindu joint family becoming partner of firm and managing director of company which took over the business—Remuneration earned by—If income of joint family for purposes of assessment to income-tax.

If for the purpose of contribution of his share of the Capital in the firm the karta of a joint Hindu family brought in monies out of the till of the Hindu undivided family, then he must be regarded as having entered into the partnership for the benefit of the Hindu undivided family and as between him and the other members of his family he would be accountable for all profits received by him as his share out of the partnership profits and such profits would be assessable as income in the hands of the Hindu undivided family.

Where the promotion of a company and taking over a concern (of which *R* the Karta of a Hindu joint family was a partner) and the financing of it were all done with the help of the joint family funds and *R* did not contribute anything out of his personal funds if any, the managing director's remuneration received by *R* was, as between him and the Hindu undivided family, the income of the latter and should be assessed in its hands.

The acquisition of the business, the floatation of the company and the appointment of the managing director are inseperably linked together. The joint family assets were used for acquiring the concern and for financing it and in lieu of all that detriment to the joint family properties the joint family got not only the shares standing in the names of the Karta and his brother but also, as part and parcel of the same scheme, the managing directorship of the company when incorporated.

Appeal by Special Leave from the Judgment and Order, dated the 8th September, 1955, of the Calcutta High Court in Income-tax Reference No. 77 of 1951.

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* C.A. No. 431 of 1957. 15th May, 1959.

C. K. Daphtary, Solicitor-General of India (*Ganapathy Iyer* and *D. Gupta*, Advocates, with him), for Appellant.

N. C. Chatterjee, Senior Advocate (*B. Sen Gupta* and *D. N. Mukherjee*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Das, C.J.—This appeal by Special Leave is directed against the order of the High Court of Calcutta passed on September 8, 1955, on a reference made by the Income-Tax Appellate Tribunal under section 66 (1) of the Indian Income-Tax Act whereby the High Court answered the first question referred to it in the negative and the second question in favour of the respondent assessee. The facts leading up to the present appeal are briefly as hereinafter narrated.

The respondent was at all material times a Hindu undivided family of which one B. K. Rohatgi was the eldest male member and as such its *karta*. It appears that in 1930 the said B. K. Rohatgi became interested in a concern called the India Electric Works carried on by Milkhi Ram and other persons none of whom was a member of the assessee family. Evidently it was decided that a Company would be floated, *inter alia*, for the purpose of acquiring and taking over the said India Electric Works as a going concern. The said B. K. Rohatgi was one of the promoters of that Company. Pursuant to an agreement with the vendors of the business of India Electric Works the said B. K. Rohatgi, as such promoter as aforesaid and on behalf of the said Company then to be formed, took over the said business as a going concern on and from March 1, 1930, and carried on the same since then until December 19, 1930, when the contemplated Company was eventually incorporated under the Indian Companies Act as a private company with limited liability under the name of India Electric Works Ltd. (hereinafter called "the said Company".)

Article 132 of the Articles of Association of the said Company provided that the first Managing Director would be the said B. K. Rohatgi or "his assigns or successors in business whether under his name or any other style or firm" and that the said B. K. Rohatgi would continue to be the Managing Director until he would resign or be found guilty of any act of fraud or dishonesty or be removed in the manner thereinafter provided. Article 133 laid down the circumstances in which and the conditions on which the Managing Director might be removed. Article 135 provided for the remuneration of the Managing Director which was fixed at Rs. 6,000 per annum or a commission of 15 per cent. on the net profits of the Company to be computed in the manner therein mentioned. The powers of the Managing Director were enumerated in Article 136 under twenty sub-heads. Article 138 provided that the Company should "forthwith enter into an agreement under the seal with Mr. Benoy Krishna Rohatgi in terms of the draft which has been approved on behalf of the Company". For some reason or other, not apparent on the record, it was not till January 31, 1934, that an agreement was actually entered into between the said Company and the said B. K. Rohatgi. The terms and conditions contained in the agreement and the powers and authorities conferred thereby on B. K. Rohatgi were in substance the same as those mentioned in the Articles of Association referred to above.

Of the total 950 ordinary shares of Rs. 500 each issued and subscribed, 326 shares stood in the name of the said B. K. Rohatgi, 356 shares in the name of his brother R. K. Rohatgi and 10 shares in the name of one Laxminarain said to be an employee of the assessee-family. There is no dispute that prior to the accounting year relevant to the assessment year 1943-44 the Managing Director's remuneration received by the said B. K. Rohatgi was credited in the books of the Hindu undivided family just as the dividends on the shares held in the names of his brother and of himself had been done. In paragraph 6 of the Statement of the Case it is stated :—

1. (1947) 15 I.T.R. 124.

"It was not denied by the Assessee that India Electric Works Limited was floated mainly with the funds provided by the Assessee and Mr. Rohatgi made no contribution in this respect. Further, all along its career Indian Electric Works Limited was financecd from time to time by the Assessee Hindu Undivided Family. It was further found that it was for the first time in the year of assessment that the Assessee claimed that the remuneration belonged to Mr. Rohatgi personally. Up to 1942-43 assessment all along both Mr. Rohatgi and the Hindu Undivided Family Assessee in their accounts treated the whole of the remuneration paid to Mr. Rohatgi as the income of the Hindu Undivided Family."

In the accounting year relevant to the assessment year 1943-44 the Managing Director's remuneration received by B. K. Rohatgi amounted to Rs. 61,282 and during the 1943-44 assessment proceedings it was claimed that the whole of it was the personal earnings of the said B. K. Rohatgi and should not be added to the income of the Hindu undivided family which is the respondent before us.

The Income-tax Officer rejected this claim. On appeal to the Appellate Assistant Commissioner, the latter concurred with the view of the Income-tax Officer. The assessee went up on further appeal to the Income-tax Appellate Tribunal. The Tribunal struck a middle course. It held that Rs. 61,282 was made up of two kinds of remuneration, namely (1) remuneration for services rendered by the assessee family in the floatation and financing of the said Company and (2) remuneration for the personal services of the said B. K. Rohatgi. The Tribunal, therefore, apportioned the amount received between the two categories of remuneration and allocated Rs. 30,000 computed at the rate of Rs. 2,500 per month to the personal services of the said B. K. Rohatgi and the rest to the remuneration due to the services of the assessee family.

On the application of the respondent-assessee the Tribunal made a reference under section 66 (1) of the Indian Income-tax Act and the questions referred were as follows :—

"(1) Whether on the facts and in the circumstances of this case, the Income-tax Appellate Tribunal was justified in apportioning the sum of Rs. 61,282 into two parts assessing one in the hands of the Assessee Hindu undivided family and the other in the hands of Mr. B. K. Rohatgi ?

(2) If the answer to the above question be in the negative whether the assessment of the said um of Rs. 61,282 should be on Mr. Rohatgi personally or on the Assessee Hindu undivided family?"

When the reference came up before the High Court for hearing, the learned Judges felt that the statement of case submitted by the Tribunal was inadequate and that it would not be possible for the Court to answer the questions unless certain other facts were clearly stated. The High Court accordingly directed the Tribunal to submit a further statement of case and to include therein answers to the following questions :—

"(*a*) With whose funds were the shares, on the strength of which Mr. Rohatgi has been and is the Managing Director, purchased and to whom do they really belong ?

(*b*) Who has been in enjoyment of the dividend paid on those shares ?

(*c*) In what capacity was Mr. Rohatgi originally appointed to and was holding, at the relevant time, the office of the Managing Director of the India Electric Works, Ltd., namely, whether in his personal and individual capacity or otherwise ?

(*d*) Besides the qualifying shares, are there any further shares of the Company standing in the name of Mr. Rohatgi and if there are such shares, with whose funds were such shares acquired and to whom do they really belong ?"

A further statement of case was accordingly submitted by the Tribunal. The Tribunal concluded its findings and expressed its opinion on the questions specifically as follows :—

"*Questions* (*a*), (*b*) and (*d*).—All the shares in the India Electric Works, Limited, standing in the name of Mr. B. K. Rohatgi (326 shares) and Mr. R. K. Rohatgi (356 shares) were acquired with funds belonging to the assessee family and they belong to the family and the family has been in enjoyment of the dividends paid on those shares. Besides the 10 qualifying shares there are 316 more shares in the Company standing in the name of Mr. B. K. Rohatgi and those shares also belong to the assessee family.

Question (*c*).—The answer is a matter of inference from the facts above stated. The Tribunal's conclusion was that Mr. B. K. Rohatgi was originally appointed to and was at the relevant time holding the office of the Managing Director of the India Electric Works, Limited, in his capacity as a member and karta of the assessee family."

Learned counsel appearing before the High Court did not make any attempt to support the Tribunal in its choice of the middle path but conceded that the income was either the income of the family or the personal income of the said B. K. Rohatgi and that there could be no justification for ascribling a portion of it to the remuneration of the said B. K. Rohatgi as an officer of the Company and ascribing the other portion to a return made by the Company to the family for benefits received. The High Court accordingly answered the first question in the negative. As regards the second question, the High Court thought that the case was covered by the decision in the case of *Commissioner of Income-tax, Madras* v. *S. N. N. Sankaralinga Iyer*,[1] and expressed the opinion that the assessment of the said sum of Rs. 61,282 should be on Mr. Rohatgi personally.

Feeling aggrieved by the aforesaid answer, the Commissioner of Income-tax applied for and obtained from this Court Special Leave to appeal to this Court against the order of the High Court. The learned Solicitor-General appearing before us in support of this appeal has not challenged the correctness of the answer given by the High Court to the first question and, therefore, we are now concerned only with the correctness of the answer given by the High Court to the second question.

It is now well settled that a Hindu undivided family cannot as such enter into a contract of partnership with another person or persons. The *karta* of the Hindu undivided family, however may and frequently does enter into partnership with outsiders on behalf and for the benefit of his joint family. But when he does so, the other members of the family do not , *vis-a-vis* the outsiders, become partners in the firm. They cannot interfere in the management of the firm or claim any account of the partnership business or exercise any of the rights of a partner. So far as the outsiders are concerned, it is the *karta* who alone is and is in law recognised as, the partner. Whether in entering into a partnership with outsiders, the *karta* acted in his individual capacity and for his own benefit or he did so as representing his joint family and for its benefit is a question of fact. If for the purpose of contribution of his share of the capital in the firm the *karta* brought in monies out of the till of the Hindu undivided family, then he must be regarded as having entered into the partnership for the benefit of the Hindu undivided family and as between him and the other members of his family he would be accountable for all profits received by him as his share out of the partnership profits and such profits would be assessable as income in the hands of the Hindu undivided family. Reference may be made to the cases of *Kaniram Hazarimull* v. *Commissioner of Income-tax, West Bengal*,[2] and *Dhanwatay, V.D.* v. *Commissioner of Income-tax, Madhya Pradesh and Bhopal*[3], in support of this view. The same principle has been applied to the case of a *karta* appointed as a Treasurer of a Bank and the remuneration received by him for services rendered as such Treasurer has been treated as the income of the Hindu undivided family of which he was the *karta* and was assessed in its hands. The same principle has been extended to the remuneration received by a *karta* as the managing agent of a Company with limited liability (See *Haridas Purshottam*, In re)[4]. Stone C.J., with whom Chagla, J., agreed, held that as the managing agency was derived from or acquired with the assistance of the joint family property, that is, the mills in which the assessee as *karta* was beneficially interested, the income from the managing agency received by the assessee must be treated as the income of the family of which he was the *karta* Reference is, however, made to certain decisions in support of the contrary view; but those decisions appear to turn on the facts found to be established in those particular cases. Thus, in *Murugappa Chetty* v. *Commissioner of Income-tax, Madras*[5] it had not been established either that the managing agency agreement had, in fact, been obtained by the *karta* for and on behalf of the Hindu undivided family or that the income was earned by utilising the joint family property or utilising it to its detriment. The case of *R. Hanumanthappa* v. *Commissioner of Income-tax, Madras*[6], simply follows *Murugappa Chetty's case*[1], and does not carry the matter any further. As

1. (1950) 1 M.L.J. 443 : 18 I.T.R. 194.
2. (1955) 27 I.T.R. 294.
3. (1957) 32 I.T.R. 682.
4. (1947) 15 I.T.R. 124.
5. (1952) 2 M.L.J. 17 : 21 I.T.R. 311.
6. (1952) 2 M.L.J. 742 : 22 I.T.R. 364.

will be seen hereafter, to the fact established in the case now before us these two decision can have no application.

It is then stated that the position of a Managing Director stands on a footing different from that of a partner or a managing agent and, therefore, the principles applicable to the income derived by a *karta* as a partner or managing agent cannot apply to the remuneration received by the *karta* as the Managing Director of a Company. In the first place it is said that under the Indian Companies Act, a Hindu undivided family cannot, by reason of the definition given in section 2 (9-A) be appointed a managing agent of a Company. In the next place, the office of a managing director, it is urged, involves a personal element and the appointment of a managing director must necessarily be of a particular person for his personal skill and other qualities and therefore, the remuneration received by him must be his personal earnings. Neither of these two considerations appears to us to be tenable. *Vis-a-vis* the Company the managing director is undoubtedly the individual person who is appointed as such. The Company is not concerned with the managing director's Hindu undivided family or the members thereof, just as the outside partners know only the *karta* in his individual capacity as their partner and are not concerned with his Hindu undivided family or its members. The question whether the amount received by the *karta* by way of managing director's remuneration in the one case or as his share of profits in the partnership business in the other case is his personal income or is the income of his Hindu undivided family cannot arise as between the Company and the *karta* as the managing director or between the outside partners and the *karta* as a partner. Neither the company nor the outside partners, as the case may be, is or are interested in such a question. Such question can arise only as between the *karta* and the members of his family and the answer to the question will depend on whether the remuneration or profit was earned with the help of joint family assets. The case of *Sardar Bahadur Indra Singh* v. *Commissioner of Income-tax, Bihar and Orissa*[1], is clearly distinguishable in that it was expressly provided in the Articles of Association of the Company in that case that the remuneration of the managing director would be his personal income. In *Commissioner of Income-tax, Bihar and Orissa* v. *Darsanram*[2], the finding of fact was that the joint family property had not been spent in earning the managing directors remuneration which was, therefore, held to be the personal earnings of the *karta* who had been appointed as the managing director. The case of *Commissioner of Income-tax, Madras* v. *S.N.N. Sankaralinga Iyer*[3], does not help the respondent because of the facts found in that case. In that case it was found that the remuneration of the managing director was earned by him in consideration of the services which he rendered to the bank and no part of the family funds had been spent or utilised for acquiring that remuneration except that the necessary shares to acquire the qualification of a managing director were purchased out of the joint family funds. It was said that there was no detriment to the family property in any manner or to any extent, as admittedly the shares earned dividends which were included in the income of the family. Satyanarayana Rao, J., took the view that on the facts of that case it was impossible to infer that the appointment itself was on behalf and for the benefit of the family ; or in other words, that he became the managing director as representing the undivided family. Viswanatha Sastri, J., in a separate but concurring judgment expressed the view that the mere fact that the assessee had a particular quantity of shares as manager of a joint family did not *ipso facto* enable him to function as the managing director. His personal qualifications were mainly responsible, in addition to the holding of shares, for his selection and appointment as the managing director of the bank. The remuneration, according to the learned Judge, was really *quid pro quo* for the work which he did under the contract of service with the bank. The managing directorship, he held, was in fact a contract of service and it is not as if the family represented by the manager was the managing director. It was the individual that was appointed

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1. (1943) 11 I.T.R. 16.
2. (1945) 13 I.T.R. 419.
3. (1950) 1 M.L.J. 443 : 18 I.T.R. 194.

and that was functioning as the managing director. With great respect to the learned Judges, it appears to us that they overlooked the principles laid down by the Judicial Committee in *Gokul Chand* v. *Hukam Chand-Nath Mal*[1], where it was pointed out that there could be no valid distinction between the direct use of the joint family fund and the use which qualified the member to make the gains on his own efforts. The member of the joint family entered into the Indian Civil Service no doubt by reason of his intelligence and other attainments. He certainly entered into a personal agreement with the Secretary of State in Council and he received his salary for rendering his personal service. But all that was made possible by the use of the joint family funds which enabled him to acquire the necessary qualification and that fact made his earnings part of the joint family properties. That apart, those decision do not clearly govern the case now before us.

What are the facts here? Here was the Hindu undivided family of which B. K. Rohatgi was the *karta*. It became interested in the concern then carried on by Milkhi Ram and others under the name of India Electric Works. The *karta* was one of the promoters of the Company which he floated with a view to take over the India Electric Works as a going concern. In anticipation of the incorporation of that Company the *karta* of the family took over the concern, carried it on and supplied the finance at all stages out of the joint family funds and the finding is that he never contributed anything out of his separate property, if he had any. The Articles of Association of the Company provided for the appointment as managing director of the very person who, as the *karta* of the family, had promoted the Company. The acquisition of the business, the floatation of the Company and the appointment of the managing director appear to us to be inseparably linked together. The joint family assets were used for acquiring the concern and for financing it and in lieu of all that detriment to the joint family properties the joint family got not only the shares standing in the name of two members of the family but also, as part and parcel of the same scheme, the managing directorship of the company when incorporated. It is also significant that right up to the accounting year relevant to the assessment year 1943-44 the income was treated as the income of the Hindu undivided family. It is true that there is no question of *res judicata* but the fact that the remuneration was credited to the family is certainly a fact to be taken into consideration. It appears to us that the case is governed by the principles laid down in *Haridas Purshottam's case*[2]. The recitals in the agreement also clearly point to the fact of B. K. Rohatgi having been appointed managing director because of his being a promoter of the company and having actually taken over the concern of India Electric Works from Milkhi Ram and others. The finding in this case is that the promotion of the Company and the taking over of the concern and the financing of it were all done with the help of the joint family funds and the said B. K. Rohatgi did not contribute anything out of his personal funds if any. In the circumstances, we are clearly of opinion that the managing director's remuneration received by B. K. Rohatgi was, as between him and the Hindu undivided family, the income of the latter and should be assessed in its hands. We, therefore, set aside the answer given by the High Court to the second question and answer the same by saying that the assessment of the whole of the sum of Rs. 61,282 should be on the assessee Hindu undivided family. The result is that this appeal is allowed with costs here and in the Court below.

Appeal allowed.

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1. (1921) L.R. 48 I.A. 162 : 40 M.L.J. 327 (P.C.).
2. (1947) 15 I.T.R. 124.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. SUBBA RAO AND J. C. SHAH, JJ.

Shri Bhaskar Waman Joshi (deceased) and others .. *Appellants**

v.

Shrinarayan Rambilas Agarwal (deceased) and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 58 (c)—Mortgage by conditional sale or sale with option to repurchase—Test.

The Legislature added the Proviso to clause (*c*) of section 58 of the Transfer of Property Act in 1929 enacting that a transaction shall not be deemed to be a mortgage unless the condition referred to in the clause is embodied in the document which effects or purports to effect the sale. But it does not follow that if the condition is incorporated in the deed effecting or purporting to effect a sale a mortgage transaction must of necessity have been intended. The question whether by the incorporation of such a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The circumstance that the condition is incorporated in the sale-deed must undoubtedly be taken into account, but the value to be attached thereto must vary with the degree of formality attending upon the transaction. The definition of a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified. What distinguishes the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt. The form in which the deed is clothed is not decisive. The definition of a mortgage by conditional sale itself contemplates an ostensible sale of the property. The circumstance that the transaction as phrased in the document is ostensibly a sale with a right of repurchase in the vendor, the appearance being laboriously maintained by the words of conveyance needlessly iterating the description of an absolute interest or the right of repurchase, bearing the appearance of a right in relation to the exercise of which time was of the essence is not decisive. The question in each case is one of determination of the real character of the transaction to be ascertained from the contents of the deed viewed in the light of surrounding circumstances. If the words are plain and unabiguous they must in the light of the evidence of surrounding circumstances be given their true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts. Oral evidence of intention is not admissible in interpreting the covenants of the deed but evidence to explain or even to contradict the recitals as distinguished from the terms of the document may of course be given. Evidence of contemporaneous conduct is always admissible as a surrounding circumstance ; but evidence as to subsequent conduct of the parties is inadmissible.

[In the light of the above principles the suit document was held to be a mortgage and not a sale.]

Appeal from the Judgment and Decree, dated the 14th February, 1952, of the former Nagpur High Court in First Appeal No. 10 of 1945 arising out of the Judgment and Decree, dated the 25th September, 1944, of the Second Additional District Judge, Amravati, in Civil Suit No. 11-A of 1943.

C. B. Agarwal, Senior Advocate (*A. G. Ratnaparkhi,* Advocate, with him) for, Appellants Nos. 1 (*a*) to 1 (*c*).

W. S. Barlingay, Senior Advocate (*S. N. Andley* and *Rameshwar Nath,* Advocates of *Messrs. Rajinder Narain and Co.,* with him), for Respondents Nos. 2-7.

The Judgment of the Court was delivered by

Shah, J.—This is an appeal against the decree of the High Court of Judicature at Nagpur in Civil Appeal No. 10 of 1954 reversing the decree passed by the Second Additional District Judge, Amravati, in Civil Appeal No. 5-A of 1954. The High Court has by its decree directed the Court of first instance to pass a decree for redemption.

The appeal raises a question as to the true effect of a deed, dated September 10, 1931, executed by Shri Narayan Rambilas Agarwal and his two sons Sadan

* C.A. No. 16 of 1955 3rd November, 1959.

Gopal and Murli Dhar in favour of two brothers Bhaskar Waman Joshi and Trimbak Waman Joshi. The deed ostensibly conveys an absolute title to certain properties described therein. The transferors under the deed contend that the property transferred by the deed was intended to be mortgaged under a deed of conditional sale. The transferees contend that by the deed an absolute conveyance of the property thereby conveyed was intended and that the conveyance was subject to a condition of repurchase to be exercised within a period of five years from the date of the deed. The Court of first instance dismissed the suit holding that the transaction in the deed, dated September 10, 1931, was of the nature of an absolute of conveyance with a condition of repurchase and the period limited by the deed for reconveyance had expired long before the date of the suit. The High Court held that the transaction was a mortgage by conditional sale and on that view reversed the decree and directed that a redemption decree be passed.

The properties in dispute are three in number: (1) a house in Amravati outside the Amba Gate bearing Municipal No. 5/98; (2) A Chawl in Amravati bearing old Municipal Nos. 6/857, 6/858 and 6/859; and (3) a house situated in Dhanraj Lane, Amravati, bearing old Municipal No. 3/459. By the deed the properties were separately valued. The house at Amba Gate was valued at Rs. 11,500, the Chawl was valued at Rs. 26,000 and the house at Dhanraj Lane was valued at Rs. 2,000. At the date of this transaction, the transferors were indebted to the Imperial Bank of India in the sum of Rs. 30,000 and Rs. 9,500 were due to the transferees and their relations and friends, and to satisfy this liability of Rs. 39,500 the deed was executed. Possession of the property transferred was delivered by calling upon the tenants in occupation to attorn to the transferees. The transferees constructed eight shops in the compound of the Amba Gata house in the year 1940-1941 and made certain other constructions in the compound of the Chawl, and they sold the Dhanraj Lane house to one Suraj Mal Salig Ram. On August 26, 1943, the transferors served a notice upon Bhaskar Waman Joshi and the representatives in interest of Trimbak Waman Joshi stating that they were willing to redeem the mortgage created by the deed, dated September 10, 1931, and called upon the transferees "to render full, true and proper account" of the amount claimable under the deed. By their reply Bhaskar Waman Joshi and the representatives of Trimbak Waman Joshi denied that the transferors had any right to redeem the property conveyed by the deed and asserted that the claim "to treat the sale as a mortgage was an afterthought" in view of the abnormal rise in prices which had lately taken place. On September 9, 1943, the three transferors and other members of their joint Hindu family filed suit No. 5-A of 1943 in the Court of the Additional District Judge, Amravati, against Bhaskar Waman Joshi and the representatives in interest of Trimbak Waman Joshi and Suraj Mal Salig Ram for a decree for redemption alleging that the transfer incorporated in the deed, dated September 10, 1931, was in the nature of a mortgage by conditional sale.

Exhibit D-1 which is the deed in question recites that the transferors were indebted, that they needed Rs. 39,500 to discharge their liability; that Rs. 2,320 were due to the transferees and that amount was set off and the balance of Rs. 37,180 was paid by eight cheques drawn on the Imperial Bank of India. It was then recited that the immovable properties described in the deed were conveyed in full ownership and that the possession was delivered to the transferees. The deed then proceeded to recite the conditions "in respect of this sale".

"If our heirs or ourselves demand reconveyance of one, two or all the three houses of the above estate at any time within 5 (five) years of this date (this time-limit shall be followed very strictly—it has been finally settled that we will lose this right if one or more day expires), your or your heirs shall reconvey to us at our expenses tbe respective houses for their respective prices mentioned in this deed of sale. With a view that both sides should have equal right in respect of this condition, it has been agreed between us that if our heirs or ourselves do not exercise this right of reconveyance in respect of all the three houses or any one of them within four and a half years of this day and if for any reasons you or your heirs do not deem it proper to retain any one or all these houses hereafter, you and your heirs have a right to take back from us or our heirs the amount of consideration of this deed of sale and to return all the three houses or any of them in the condition in which the same may be at that time and if you or your heirs express such a desire and if we or

our heirs fail to compy with it, it shall be tantamount to our breaking the agreement of reconveyance and we and our heirs will be liable to pay damages. It has been (further) agreed between us that in the event of such a reconveyance, our heirs and ourselves will pay full prices (as mentioned in this deed of sale) of the estate in the condition in which it may be at that time, that is, in the condition in which it may be on account of heavenly mishap or Government action, on account of any reason whatsoever or on account of fall in prices."

The Courts below differed in their interpretation of the true effect of these conditions. In the view of the learned trial Judge, the intention of the parties was to effect an absolute sale and not a mortgage. The High Court did not agree with that view.

By clause (*c*) of section 58 of the Transfer of Property Act, mortgage by conditional sale is defined as follows :

"Where the mortgagor ostensibly sells the mortgaged property—

on condition that on default of payment of the mortgage money on a certain date, the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by onditional sale :

Provided that no such transaction shall be deemed to be a mortgage unless the condition is embodied in the document which effects or purports to effect the sale."

The Proviso to this clause was added by Act XX of 1929. Prior to the amendment there was a conflict of decisions on the question whether the condition contained in a separate deed could be taken into account in ascertaining whether a mortgage was intended by the principal deed. The Legislature resolved this conflict by enacting that a transaction shall not be deemed to be a mortgage unless the condition referred to in the clause is embodied in the document which effects or purports to effect the sale. But it does not follow that if the condition is incorporated in the deed effecting or purporting to effect a sale a mortgage transaction must of necessity have been intended. The question whether by the incorporation of such a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The circumstance that the condition is incorporated in the sale deed must undoubtedly be taken into account but the value to be attached thereto must vary with the degree of formality attending upon the transaction. The definition of a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and the mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified. What distinguishes the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt. The form in which the deed is clothed is not decisive. The definition of a mortgage by conditional sale itself contemplates an ostensible sale of the property. As pointed out by the Judicial Committee of the Privy Council in *Narasingerji Gyanagerji* v. *Panuganti Parthasaradhi and others*[1], the circumstance that the transction as phrased in the document is ostensibly a sale with a right of repurchase in the vendor, the appearance being laboriously maintained by the words of conveyance needlessly iterating the description of an absolute interest or the right of repurchase bearing the appearance of a right in relation to the exercise of which time was of the essence is not decisive. The question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the deed viewed in the light of surrounding circumstances. If the words are plain and unambiguous they must in the light of the evidence of surrounding circumstances be given their true legal effect. If there is ambiguity in the language employed,

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1. (1924) 47 M.L.J. 809 : L.R. 51 I.A. 305 : I.L.R. 47 Mad. 729 (P.C.).

the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts. Oral evidence of intention is not admissible in interpreting the covenants of the deed but evidence to explain or even to contradict the recitals as distinguished from the terms of the documents may of course be given. Evidence of contemporaneous conduct is always admissible as a surrounding circumstance ; but evidence as to subsequent conduct of the parties is inadmissible.

In the light of these principles the real character of the document Exhibit D-1 may be ascertained. The conditions of reconveyance may be analysed :

(1) that the transferees shall reconvey the properties within five years from the date of the conveyance to the transferor at the expense of the transferors for the price mentioned in the deed ; (2) that if within four years and six months from the date of the conveyance, the right of reconveyance in respect of the three houses or any of them is not exercised by the transferors and if the transferees do not desire to retain all or any of the houses, they have the right to recall from the transferors the amount of the consideration and to return all or any of the three houses in the condition in which they may be ; (3) that in the event of failure on the part of the transferors to comply with the request to take back the houses, a breach of agreement, of reconveyance rendering the transferors liable to pay damages shall be committed; (4) that in the event of reconveyance the transferors shall pay the full price set out in the sale deed and take back the houses in the condition in which by *vis major*, Government action or any reason whatsoever they may be. Evidently the transferors have under the deed a right to call upon the transferees to reconvey the properties within five years from the date of the conveyance ; but after the expiry of four years and six months the transferees are given the option to call upon the transferors to take back all or any of the properties for the prices mentioned in the deed ; and if such right was exercised the transferors were bound to take back the properties and return the price even if on account of *vis major* or action of the public authorities the property was prejudicially affected. The deed does not set out the period within which this right is to be exercised by the transferees. Granting that the option of reconveying the properties against the price mentioned in the deed was to be exercised by the transferors before the expiry of five years from the date of the deed, the covenant that damage to property even on account of circumstances over which the transferees had no control was in the event of reconveyance to be borne by the transferors, is strongly indicative of a mortgage. By this covenant the transferees were invested with the right to call upon the transferors to "take back" all or any of the houses and to return the price therefor; indicating thereby that the price paid is in truth charged upon the property. By calling upon the tenants to attorn to the transferees, possession of the property transferred was delivered and pursuant to the transfer, it was mutated in the names of the transferees. By an express covenant the period of five years was also made of the essence of the contract but as observed in *Narasingerji's case*[1], the description of the document as one of an absolute sale and the right of repurchase bearing the appearance of a right in relation to the exercise of which time is of the essence are not decisive of the true nature of the transaction.

The circumstances surrounding the deed at the date of the execution of the deed also support the view that the transaction incorporated in Exhibit D-1 was intended to be a mortgage. Before the execution of the deed Exhibit D-1 a draft sale deed was prepared. By the draft sale deed Exhibit P-13, only two properties, the Amba Gate house valued at Rs. 10,000 and the Chawl valued at Rs. 25,000 were to be conveyed. By the final sale deed, the Dhanraj Lane house was also agreed to be conveyed and that house was valued at Rs. 3,500. The transferors were evidently in straitened circumstances and immediately needed Rs. 30,000 to discharge their liability to the Imperial Bank ; and the liability to the transferees and

1. (1924) 47 M.L.J. 809 : L.R. 51 I.A. 305 : I.L.R. 47 Mad. 729 (P.C.).

their relations and friends amounted to Rs. 9,500. It is for this amount of Rs. 39,500 that the properties were conveyed. On the date on which the deed was executed, also an agreement Exhibit D-3 was executed by the three transferors. That agreement recited that the sale deed was to be executed for past debts and for paying off the debts cheques were taken from the transferees and the transferees were put in possession of the houses sold. A request was then made that the transferees should not get the deed registered for two months or at least for eight to fifteen days, because the transferees had to make arrangements for payment to the creditors and in the event of the deed being registered, other creditors may make demands for their dues. It was then stated,

"you want that you should get an income of nine per cent. per annum from these houses till reconveyance but it is evident that after meeting repairing or insurance charges thereof, there will not remaln so much profit in balance. Therefore, we have already agreed before that the agreement of reconveyance mentioned in the deed of sale shall be brought into effect only when ourselves or our heirs pay to you all the expenses incurred by you as found due according to your account-books and complete your (nine) per cent ".

This agreement and the sale deed were executed on the same day. Evidently by this agreement the transferors undertook to pay the difference between the net rent to be recovered and interest at the rate of nine per cent. on the price till the date of reconveyance, and that the right of reconveyance was to be enforceable only when the difference between the interest at nine per cent. on the price and the rent recovered less repairs, insurance charges according to the books of account of the transferees was paid. *Prima facie* this is a personal covenant whereby the transferors agreed to pay interest at the rate of nine per cent. on the price paid till the date of reconveyance. This agreement strongly indicates that the parties regarded the arrangement incorporated in the deed, dated September 10, 1931, as a mortgage. The contention raised by the transferees that by this covenant they were to erect additional structures at their own expense upon the land and collect rent which may be equivalent to interest at the rate of nine per cent. on the price paid and the amounts spent by them is on the language used in the deed unwarranted. There is in the deed no reference to any additional amount to be spent by the transferees for erecting buildings upon the land conveyed ; and the books of the transferees are referred to in the agreement only to make the accounts maintained by them binding upon the transferors. Counsel for the transferees urged that this agreement not being registered was inadmissible in evidence. *Ex facie* the document does not purport to create, declare, limit or extinguish any right, title or interest in immoveable property ; it incorporates a mere personal covenant and it is difficult to appreciate the plea that the document is wholly inadmissible for want of registration. This agreement indisputably contains a condition relating to reconveyance incorporated in a registered instrument and may not be admissible in the absence of registration as evidencing any alteration of the terms of reconveyance. But this agreement in so far as it evidences a personal covenant to pay interest at the rate specified, is admissible. It is a somewhat singular circumstance that before the High Court, when counsel for the contending parties were invited by the Court to argue whether the document was by law required to be registered counsel urged that the document was admissible in evidence without registration and insisted upon arguing the case on that footing.

The question whether the price paid was adequate may also be adverted to. The Court of first instance held that the consideration for the properties was not inadequate ; but in the view of the High Court the consideration was wholly inadequate. Counsel for the transferees contended that the monthly rent received from the tenants occupying the properties was Rs. 270 and deducting therefrom Rs. 48 for municipal taxes and an amount equal to rent for two months as properly chargeable for repairs, insurance and collection charges, there remained only a balance of Rs. 186 per month available to the transferees and capitalising the net rent at 6 per cent. the value of the property conveyed could not exceed Rs. 30,000 and even capitalising the net rent at 5 per cent. counsel contended that the value of the property may be approximately equal to the consideration paid. There is, however, no clear evidence as to what municipal taxes were payable in respect of the houses, and whether the taxes were

payable by the tenants or by the landlord. Dr. Trimbak Joshi one of the transferees in his evidence in Suit No. 112 of 1932 deposed " that the tax came to Rs. 48 on the date of purchase ", but he did not state that this amount was payable monthly. There is again evidence of witness Balkrishna examined by the transferees that the water tax was paid by the tenants. In their written statement, the transferees had set out a statement of income and expenditure for the years 1931-1940 and in that statement for the year 1933 the expenses debited against income were Rs. 426-11-0, for 1934 Rs. 346-15-6, and for 1935 Rs. 542-2-6, for 1936 Rs. 1,666-7-0, for 1937 Rs. 1,116-1-3, for 1938 Rs. 529-2-3, for 1939 Rs. 570-11-3, and for 1940 Rs. 46-2-0. If Rs. 48 were payable as municipal tax every month, the liability on account of taxes alone far exceeded the expenses debited against the rent received. This statement of account abundantly shows that the municipal taxes were borne by the tenants and not by the landlords. The High Court in para. 34 of its judgment proceeded to estimate the rental of the properties at Rs. 245 per month and capitalised the same at 5 per cent. The High Court is not shown to be in error in accepting the net monthly rental at Rs. 245 per month.

The area of the land of the Amba Gate House is 9037 square feet, the area of the land at Chawl is 23805 square feet, and the area of land of Dhanraj Lane house is 817 square feet. There is no clear evidence on the record about the precise area of the lands covered by the structures, but it is conceded that the structures stood on an area less than one-half of the total area of the land. From the evidence especially of the valuation reports, it appears that of the Amba Gate house 5800 square feet of land were open and of the Chawl 12000 square feet of land were open. Valuation of building land with structures by capitalising the rental may yield a reliable basis for ascertaining the value of the land together with the structures only if the land is developed to its full capacity by erection of structures. If the land is not fully developed by raising structures, valuation of houses together with lands by capitalising the rent received may not furnish reliable data for assessing the market value. By aggregating the value of the land and the value of the structure separately estimated, a scientifically accurate value of the land with the structure may not be obtained. But where the land is relatively valuable and the structures are old and comparatively of small value, this method may afford a rough basis in the absence of other reliable data for ascertaining the value of the land and the structure. Exhibits D-52 and D-53 are the reports prepared by a valuer, of the market value of the Chawl and the Amba Gate house. According to the report Exhibit D-52, the value of the superstructure of the Chawl was Rs. 31,708. Out of this amount the valuer sought to deduct 20 per cent. " as per Superintending Engineer's letter, dated the 21st August, 1931 ". On what basis that deduction has been made has not been explained. He again proceeded to deduct 20 per cent. as depreciation on the cost of the building and estimated at Rs. 20,293 the value of the superstructure. It is evident that a deliberate attempt was made by the valuer to depreciate the value of the superstructure by making at least one deduction of 20 per cent. for which there is no warrant. Even assuming that this valuation of Rs. 20,293 is accurate, the value of the Chawl together with the land considerably exceeds Rs. 26,000. The valuer has valued the site at 4 as. per square foot, but no reliable evidence has been led to support that estimate. Similarly for the Amba Gate house the valuer estimated the value at Rs. 18,556 for the superstructure and he deducted 20 per cent. " with effect from the 22nd August, 1931, according to the Superintending Engineer's letter, dated the 21st August, 1931 " and 25 per cent. as depreciation charges on building and arrived at the figure of Rs. 11,134 and added thereto the value of the land at the rate of 4 as. per square foot. The evidence on the record does not warrant the assumption that the land was worth only annas four per square foot. As pointed out by the High Court in view of the sale deeds Exhibits P-9 and P-21 the price of the land fluctuated between Re. 1 and Rs. 2 as. 4 per square foot. Even if the lower of the two rates be adopted, the value of the Chawl and the Amba Gate house will considerably exceed the price embodied in the sale deed.

The house in Dhanraj Lane was valued in the draft sale deed at Rs. 3,500 and in the sale deed at Rs. 2,000. No explanation has been given for this disparity between the prices mentioned in the draft and the sale deed and there is substance in the contention strongly pressed by counsel for the transferors that the value of Rs. 2,000 for a house with a ground floor and two stories is artificial. The evidence discloses that the house was let out on a monthly rent of Rs. 20 and capitalising that rent at 5 per cent. on the assumption that by the construction the land was fully developed, the price thereof was more than double the price set out in the deed. It is clear that this house was included in the deed to make up the total value of Rs. 39,500 the amount required by the transaferors to tide over their immediate difficulties.

Counsel for the transferees sought to rely upon the evidence of subsequent conduct of the transferors as indicative of the character of the transaction as a sale, but as already observed, that evidence is iadmissible.

In our view, the High Court was right in holding that the real transaction incorporated in Exhibit D-1 was a mortgage and not a sale. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. SUBBA RAO AND J. C. SHAH, JJ.

The Official Liquidators, U. P. Union Bank Ltd. (In Liquidation) .. *Appellants**

v.

Sh. Rameshwar Nath Agarwal .. *Respondent.*

Companies Act (VII of 1913), section 230—Property continuing to remain in possession of liquidator—Rent due to landlord—When entitled to priority—Company Rules, rule 97—Scope.

Where the properties have not remained with the liquidators for the purpose of liquidation, unless the Court passes an order holding that the debt incurred was part of the costs and expenses of liquidation, the rent accruing due since the date of the winding up cannot be claimed in priority over other ordinary debts. It cannot be said that under rule 97 of the Company Rules, if the property remained in the occupation of the liquidators not for the purposes of winding up, the landlord is entitled to priority in respect of payment of rent.

Appeal from the Judgment and Order, dated the 17th April, 1956, of the Allahabad High Court in Special Appeal No. 20 of 1954 arising out of the Judgment and Order, dated the 10th February, 1954, of the said High Court (Company Jurisdiction) in Application No. 29 of 1953—Company Case No. 24 of 1949.

H. N. Sanyal, Additional Solicitor-General of India (*N. C. Sen*, Advocate, with him) for Appellants.

A. V. Viswanatha Sastri, Senior Advocate (*Mrs. E. Udayaratnam* and *S. S. Shukla*, Advocates, with him) for Respondent.

The Judgment of the Court was delivered by

Shah, J.—The U.P. Union Bank Ltd., (which will hereinafter be referred to as the Bank) was in occupation as a tenant of a building in Agra town belonging to the respondent at a monthly rental of Rs. 325 and Rs. 10 as municipal taxes. The Bank made default in paying the rent accruing due and the respondent filed Suit No. 810 of 1949 in the Court of the Munsif at Agra for a decree for rent for three months and obtained an order of attachment before judgment on the movable property of the Bank. The Munsiff, by his decree, dated December 2, 1949, decreed the suit and confirmed the order of attachment before judgment. In the meanwhile, on a petition, dated September 13, 1949, the Bank was ordered to be wound by the High Court

* C.A. No. 28 of 1958. 10th November, 1959.

of Judicature at Allahabad and the appellants were appointed liquidators of the Bank. The employees of the Bank had vacated the premises on September 10, 1949, but the property of the Bank which was attached was, with the consent of the respondent, stored by the Commissioner appointed by the Munsiff's Court in the Banking hall which was sealed by that officer. A part of the premises was, it appears, occupied by some trespassers. The Official Liquidators called upon the respondent to take possession of the premises, but the latter declined to do so unless vacant possession of the entire premises was given to him. On November 30, 1950, the respondent applied to the High Court for permission to file a suit for ejectment and for arrears of rent due since September 30, 1949. Mr. Justice Mootham, who heard the application, declined to grant permission holding that the claim which the respondent intended to put forward against the Official Liquidators in the course of the proposed suit may be adjudicated upon in the winding up proceeding, and with the consent of parties, the learned Judge proceeded to decide that claim. By Order, dated August 30, 1951, Mr. Justice Mootham directed as follows :—

"In the result.........I hold that the petitioner is entitled to recover rent from the Bank at the rate of Rs. 325 per mensem from 1st October, 1949, upto the date on which the Official Liquidators give the petitioner (the landlord) such possession of the premises as will, in law, terminate the Bank's tenancy."

Against this order, the Official Liquidators preferred an appeal being Special Appeal No. 17 of 1952 to a Division Bench of the High Court.

On April 23, 1953, the respondent applied to the Joint Registrar of the High Court to issue a certificate of non-satisfaction and to transfer the order to the Court of the Civil Judge of Allahabad for execution. The Joint Registrar issued a certificate of non-satisfaction of the order and directed that the same be transmitted to the District Judge, Allahabad, for execution. The respondent filed an application for execution in the Court of the Civil Judge, Allahabad and obtained an order for attachment of an amount of Rs. 12,000 lying to the credit of the Official Liquidators in the Allahabad Bank. The Official Liquidators thereupon applied to the High Court praying that the execution proceeding pending in the Court of the Civil Judge, Allahabad, be declared void and the order of attachment of the fund in the account of the Official Liquidators passed by the Civil Judge be qusahed. Mr. Justice Brij Mohan Lall who heard the application held that the proceeding commenced against the Official Liquidators, without the sanction of the Court under sections 171 and 232, clause (1) of the Indian Companies Act, 1913 and the attachment ordered thereunder were void and directed that the certificate of non-satisfaction be recalled. Against this order, the respondent preferred a special appeal to the High Court being Appeal No. 20 of 1954. Appeals Nos. 17 of 1952 and 20 of 1954 were then heard. Appeal No. 17 of 1952 was dismissed and by an order passed on April 17, 1956, the High Court partially modified the order of Mr. Justice Brij Mohan Lal and directed the Official Liquidators to pay to the respondent in full the amount that had fallen due to him after October 1, 1949.

The High Court was of the view that the Official Liquidators having retained the Bank's premises in their occupation, by virtue of the Proviso to rule 97 framed by the High Court, the respondent was entitled to receive the rent due to him in full and was not liable to share the assets of the Bank *pro rata* with the other ordinary creditors. Against the order passed by the High Court, this appeal has been preferred with the certificate of the High Court.

By his order Mr. Justice Mootham merely declared the liability of the Bank to pay the rent accrued due since October 1, 1949 ; there is no direction for payment of the amount, and it is not necessary to consider the plea raised by counsel for the respondent that the order being virtually one under section 45-B of the Banking Companies Act, the respondent was entitled to payment according to the tenor of the order. The order in terms declares the liability and does not decide any question of priority between the respondent and other creditors of the Bank.

By section 647 of the Companies Act No. I of 1956, the winding up of the Bank having commenced before that Act was enacted, the provisions with respect to the

winding up contained in the Indian Companies Act No. VII of 1913 continue to apply to the Bank in the same manner and in the same circumstances as if Act I of 1956 had not been passed. By section 230 of the Indian Companies Act, 1913, provision is made for payment of specified categories of debts in the winding up in priority to all other debts; but rent due to the landlord is not one of such debts to which priority is given by section 230. The High Court held that inasmuch as by rule 97 of the Company Rules, it was provided ;

"When any rent or other payment falls due at stated periods, and the order or resolution to wind up is made at any time other than one of such periods, the persons entitled to the rent or payment may prove for a proportionate part thereof up to the date of the winding up order or resolution as if the rent or payment grew due from day to day :

Provided that where the Official Liquidator remains in occupation of premises demised to a company which is being wound up, nothing herein contained shall prejudice or affect the right of the landlord of such premises to claim payment by the company, or the Official Liquidator of rent during the period of the company's or the Official Liquidator's occupation ;"

for the rent accruing due in respect of the premises which remained in the occupation of the Official Liquidators, the respondent was entitled to preferential payment. The operative part of the rule deals with the rent or other payment in arrears till the date of winding up. By the Proviso, it is declared that the right of the landlord to claim payment by the company of the rent accruing due thereafter is not to be prejudiced. The Proviso merely affirms the right of the landlord to claim payment of rent accruing due since the date of winding up. It does not deal with any question of priority in payment of debts. By section 246 of the Indian Companies Act, 1913, power is conferred upon the High Court to make rules consistent with the Act and the Code of Civil Procedure concerning the mode of proceedings to be had for winding up of the company and certain other matters. The Legislature has by section 230 prescribed that certain specified categories of debts shall rank for priority over other debts due by the company and it is not within the competence of the High Court to prescribe by rule a category for priority in payment which is not included in that section. By section 193 of the Act, the Court has, in the event of the assets being insufficient to satisfy the liabilities, indisputably power to make an order for payment out of the assets, of the costs, charges and expenses incurred in the winding up in such order of priority as the Court thinks fit, and in exercise of the power conferred by section 230, sub-clause (3), the Court may direct the company to retain such sums as may be necessary for the costs and expenses of the winding up of the company before discharging even the debts in respect of which priority is prescribed by section 230. If, therefore, there is a debt which may reasonably fall within the description of costs and expenses of winding up of the company, the Court may provide for priority in payment of that debt as it thinks just.

In the winding up of the company, it is open to the liquidators to disclaim land burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts or of any other property that is unsaleable or not readily saleable. The disclaimer operates to determine as from the date of disclaimer the rights, interests and liabilities of the company and the property of the company, in or in respect of the property disclaimed. By section 230-A, clause (4), liberty is reserved to persons interested in the property requiring the liquidator to decide whether he will or will not disclaim. It is also open to the Court under sub-section (5) of section 230-A on the application of any person entitled to the benefit or subject to the burden of a contract made with the company to make an order rescinding the contract on such terms as to payment of damages for non-performance of contracts. It is evident that on the winding up outstanding contracts of the company do not become *ipso facto* inoperative. The contracts remain binding until disclaimed or rescinded in the manner provided by section 230-A ; but the liability incurred under these contracts is merely an ordinary debt which ranks for claim to payment *pro rata* along with other creditors. If the debt be regarded reasonably as falling within the description of costs and expenses of winding up of the company, it is open to the Court to direct that preferential payment in respect thereof be made ; otherwise the debt will be claimable out of the assets of the company *pro rata* with other ordinary creditors.

Distinction has been made by the Courts in England where the relevant provisions of the Companies Act are substantially the same that if the liquidator continues in possession of leaseholds for the purpose of the better realization of assets, the lessor will be entitled to payment of the rent in full, as part of the expenses properly incurred by the liquidator ; but as observed by Lord Justice Lindley, *In re Oak Pits Colliery Company*[1];

"No authority has yet gone the length of deciding that a landlord is entitled to distrain for or be paid in full rent accruing since the commencement of the winding-up, where the liquidator has done nothing except abstain from trying to get rid of the property which the company holds as lessee."

Evidently a distinction is made between property which remains in the occupation of the liquidator after the winding up when the occupation is shown to be for the purpose of liquidation and property which merely remain with the liquidator, he having abstained from trying to get rid of the same and it does not appear or is not shown that the property was used for the purpose of winding up.

The High Court held on the facts that the liquidators had remained in occupation of the premises not for the purpose of winding up but "because they could not think of any suitable method of getting rid of the premises in spite of all their desire to do so ". It was pointed out that the Bank had closed its business and the liquidators were not carrying on any business after the winding up and the properties were not used by the liquidators for the purpose of liquidation. This conclusion of the High Court on the evidence has not been challenged. The property not having remained with the liquidators for the purpose of liquidation, unless the Court passes an order holding that the debt incurred was part of the costs and expenses of liquidation, the rent accruing due since the date of the winding up cannot be claimed in priority over other ordinary debts.

We are, therefore, unable to agree with the High Court that under rule 97 of the Company Rules, if the premises remained in the ocupation of the liquidators, not for the purpose of winding up, the landlord is entitled to priority in respect of payment of rent. On the view taken by us, the appeal will be allowed, the order passed by the High Court set aside and the order passed by Mr. Justice Brij Mohan Lall restored with costs in this Court and in the High Court.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—P. B. GAJENDRAGADKAR, K. SUBBA RAO AND J. C. SHAH, JJ.

Jibon Krishna Mukherjee and another .. *Appellants**

v.

New Beerbhum Coal Co., Ltd. .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order*, 21, *rule* 89—*If applies to a sale held by a receiver appointed by the Court in execution and authorised to sell the property.*

Order 21, rule 89, of the Civil Procedure Code, does not apply to a sale held by a receiver appointed by the Cout in execution of a decree and authorised to sell the property.

Appeal by Special Leave from the Judgment and Decree, dated the 29th April, 1959, of the Calcutta High Court in Appeal from Original Order No. 188 of 1958.

H. N. Sanyal, Additional Solicitor-General of India (*T. S. Venkatrama, K. R. Sharma* and *K. R. Chaudhry*, Advocates, with him), for Appellants.

S. N. Mukherjee, Advocate, for Respondent No. 1.

N. C. Chatterjee, Senior Advocate, (*S. K. Acharyya* and *R. S. Narula*, Advocates, with him) for Respondent No. 2.

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1. L.R. (1882) Ch. D. 321 at 331.

* C.A. No. 342 of 1959. 10th November, 1959.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The principal question which this appeal by Special Leave raises for our decision is; Whether the provisions of Order 21, rule 89, of the Code of Civil Procedure, apply to a sale held by a receiver appointed by the Court and authorised to sell the property in question. The learned Single Judge on the Original Side of the Calcutta High Court as well as the Division Bench of the said High Court have answered this question in the negative. The appellants contend that the view taken by the Calcutta High Court is erroneous.

This question arises in this way. In Suit No. 1024 of 1953 on the Original Side of the Calcutta High Court a decree for the payment of Rs. 18,497-15-0 was passed by consent in favour of the New Bheerbhum Coal Co., Ltd., (hereinafter called respondent 1) and against the Banaras Ice Factory Ltd., (hereinafter called appellant 2) on December 5, 1955. The decree provided for the payment of the decretal amount by six equal instalments and it directed that in case of default of any one of the instalments the balance of the decretal dues would at once become payable. A first charge was created by the decree on the plant and machinery of appellant 2 for securing the payment of the decretal amount. A default having occurred in the payment of instalments respondent 1 applied for the execution of the decree on April 10, 1956. On this application an interim order was made on May 17, 1956, appointing Mr. A.K. Sen as Receiver of the properties charged. The said application was finally decided by an order passed on May 30, 1956, by which the appointment of the receiver was confirmed and he was given liberty to sell the said properties either by private treaty or by public auction. It is common ground that the receiver took possession of the said property in December, 1956.

Subsequently, on March 10, 1958, the receiver entered into an agreement with Sukhlal Amarchand Vadnagra (hereinafter called respondent 2) for the sale of the said property for Rs. 30,000. The terms and conditions embodied in the said agreement provided *inter alia* that within one month from the date of the receipt by the purchaser of intimation from the receiver that the sale had been confirmed by the High Court the purchaser shall deposit with the said receiver the full price of Rs. 30,000. On March 31, 1958, respondent 1 applied to the Court for confirmation of the said agreement and on May 9, 1958, G. K. Mitter, J., allowed the application. He ordered that the appellants should deposit the sum of Rs. 3,000 with the attorneys of the decree-holder towards its claim under the said decree and further directed that if the said amount was paid within the time aforesaid and the balance of the decretal amount was paid within ten weeks thereafter the agreement of sale shall not be confirmed. The order further provided that in default of the appellants paying the amounts as directed within the respective due dates the sale of the charged property by the receiver to the second respondent as set out in the agreement shall be confirmed.

Pursuant to this order the appellants deposited with the attorneys of the decree-holder Rs. 3,000 on May 30, 1958. They had also paid to the receiver Rs. 3,500 in August, 1957, towards the decretal dues. It appears that when the appellants were unable to pay the balance as directed by the Court appellant 2 applied to the Court praying that the agreement of sale should be cancelled and the time within which he was directed to pay the balance of the decretal amount should be extended. The application also sought for certain other directions. G.K. Mitter J., who heard this application dismissed it on July 29, 1958, and confirmed the agreement of sale.

On August 20, 1958, appellant 2 took out a Notice of Motion of an application made by him on the same day praying that leave may be granted to him to deposit the whole of the balance of the decretal amount and that the receiver should be restrained from receiving any money from the intending purchaser in terms of the agreement of sale. It appears that on August 22, 1958, respondent 2 tendered a cheque for Rs. 30,000 to the receiver towards the payment of the purchase money under the agreement of sale. Soon, thereafter, however, respondent 2 took back the cheque and paid Rs. 30,000 in cash on September 1, 1958. The application

made by appellant 2 for leave to pay the balance of the decretal amount was dismissed by G. K. Mitter, J., on September 4, 1958. The learned judge, however, stayed the delivery of possession of the property to respondent 2 for a week from the the date of his order.

The appellants then filed an appeal against the order of the learned Judge before a Division Bench of the High Court and obtained an order for stay of delivery pending the decision of the appeal. On April 29, 1959, the Division Bench dismissed the appeal and refused to grant certificate to the appellants to file an appeal in this Court. The appellants then applied for and obtained Special Leave from this Court on May 20, 1959. That is how this appeal has come before us; and the main point which Mr. Sanyal, for the appellants, has raised for our decision is that the Courts below were in error in refusing to give relief to the appellants under Order 21, rule 89 on the ground that the said rule was inapplicable to the sale held by the receiver.

It is common ground that the receiver was appointed with

"power to him to get in and collect the outstanding debts and claims due in respect of the charged property and with all powers provided for in Order 40, rule 1, clause (*d*) of the Code of Civil Procedure."

The order appointing the receiver also expressly directed that the receiver shall be at liberty to sell the said property charged in favour of respondent 1 either by private treaty or by private auction to the best purchaser or purchasers that can be got for the sale but he shall not hold such sale before the 13th day of August, 1956. In other words, the receiver was appointed in execution proceedings under section 51 and was given all the powers under Order 40, rule 1 (*d*) of the Code. It is by virtue of these powers that he entered into the agreement of sale with respondent 2 and sold the property to him and gave him its possession. Section 51 which deals with the powers of the Court to enforce execution provides for the execution of the decree by five alternative modes specified in clauses (*a*) to (*e*). One of the modes of execution is the appointment of a receiver which means that a decree for the payment of money can be executed by the appointment of a receiver. He may either collect the income of the property belonging to the judgment-debtor and thereby satisfy the decree, or if so authorised he may sell the property of the judgment-debtor and thereby arrange for the satisfaction of the decree. Thus, in dealing with the question as to whether the sale held by the receiver is a sale ordered by the Court to which Order 21, rule 89, applies it is necessary to remember that the appointment of the receiver itself is a mode of execution of the decree.

When the receiver so appointed is given all the powers under Order 40, rule 1 (*d*), it is these powers which he seeks to exercise when selling the judgment-debtor's property in execution of the decree. The sale held by the receiver under such conditions would no doubt be governed by the provisions of Order 40, and the Court may supervise or issue directions in respect of such a sale under the provisions of the said order. *Prima facie* the sale held by the receiver appointed in execution proceedings in pursuance of the powers, conferred on him under Order 40, rule 1 (*d*) would be governed by the powers conferred on him and the terms and conditions on which the said powers may have been conferred and by other relevant provisions of Order 40. It does not seem to attract the provisions of Order 21.

Courts have had occasion to consider questions about the applicability of several provisions of Order 21 to sales held by receivers and opinions expressed on such questions have differed more particularly in the Calcutta High Court as we will presently indicate. In the present appeal we do not propose to consider or decide the general question about the character of the sale held by the receiver nor do we propose to attempt to specify which provisions of Order 21 will apply to such sales and which will not. We are dealing with the narrow question as to whether Order 21, rule 89, applies to such a sale; and it is to the decision of this narrow question that we will address ourselves in the present appeal.

Order 21, rule 89, enables the persons specified in sub-rule (1) to apply to have the sale held in execution proceedings set aside on two conditions (*a*) the applicant

must deposit for payment to the purchaser a sum equal to 5 per cent., of the purchase money, and (*b*) for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may since the date of such proclamation of sale have been received by the decree-holder. The second requirement immediately raises the question as to whether it is necessary for the receiver in selling immoveable property in execution proceedings to issue a proclamation as required by Order 21, rule 66 of the Code. In our opinion there can be no doubt that the provisions of the said rule do not apply to sales held by receivers. No decision has been cited before us where a contrary view has been expressed. The provisions of the said rule apply where property is ordered to be sold by public auction in execution by the Court, and the order for the sale of such property must be made by any Court other than the Court of Small Causes as provided by rule 82. Where the Court appoints a receiver and gives him liberty to sell the property the receiver may either sell the property and thereby realise the money for the satisfaction of the decree, or he may, even without selling the property, seek to satisfy the decree by the collection of rents due from the property or other ways open to him under the law. In such a case it is difficult to hold that by the very appointment of the receiver clothing him with the power to sell the property if he thought it necessary to do so the Court has ordered the sale of the said property within the meaning of Order 21, rule 82. If the provisions of rule 66 of Order 21 are inapplicable to sales held by receivers it is obvious that the second condition prescribed by rule 89 (1) (*b*) is equally inapplicable and it is undoubtedly one of the two essential conditions for the successful prosecution of an application under the said rule. In our opinion this fact clearly emphasises the inapplicability of the whole rule to sales held by receivers. We are, therefore, satisfied that the High Court was right in refusing to entertain the appellant's application under Order 21, rule 89.

It is then argued that the High Court should have considered the appellants' prayer under section 151 of the Code. It is no doubt a hard case where the appellants have to lose their property though presumably at the time when they made the present application in the High Court they were able to produce for the payment to the decree-holder the whole of the balance of the decretal amount. As the judgment of the Division Bench shows the learned Judges themselves have observed that it was difficult not to feel sympathy for the appellants; but, on the other hand, it is clear from the record that the appellants were given enough opportunity to pay the decretal amount. The decree was passed by consent and included a default clause. The appellants committed default and incurred the liability to pay the whole of the decretal amount. When the agreement of sale executed by the receiver came before the Court another opportunity was given to the appellants to pay the decretal amount on the specified conditions. The appellants again committed a default. It is only later when it was too late that they rushed to the Court with a prayer that they should be allowed to pay the decretal amount themselves and their property should be saved. Under such circumstances, if the learned Judge who heard their application as well as the appellate Court came to the conclusion that the Court's jurisdiction under section 151 cannot be invoked by the appellants, we do not see how we can interfere with the said decision. It is true that section 151 is not specifically mentioned in the judgment of either of the Courts below but that must be obviously because no specific plea under section 151 was raised. Even so the Division Bench has observed that it could not interfere with the order of the learned Judge when in his discretion he refused to make an order as asked for by the appellants. This must inevitably refer to the discretion under section 151, because if Order 21, rule 89, had applied and the appellants had satisfied the conditions prescribed by it there would be no discretion in the Court to refuse such an application. It would then have been right of the appellants to claim that the sale should be set aside. We are, therefore, unable to accede to the plea raised before us by Mr. Sanyal under section 151 of the Code.

There is another point which Mr. Sanyal attempted to raise. He contended that the sale had not been properly confirmed before he moved the Court for leave

to pay the decretal amount, and so the Courts below were in error in not allowing his application. This argument is based on a decision of the Calcutta High Court in *S. M. Sudevi Devi* v. *Sovaram Agarwallah*[1]. In that case Woodroffe J., was dealing with a conditional decree which entitled the decree-holder, on the default of the defendant, to apply to the Court which passed the decree to direct the ejectment of the defendant. It appears that when disputes aroses between the decree-holder and the judgment-debtor in regard to the performance of the conditions imposed by the decree the decree-holder obtained an order for ejectment of the defendant without notice to the judgment-debtor. The judgment-debtor then applied for setting aside, modifying or reviewing the said order. Woodroffe, J., held that a Court had inherent power to deal with an application to set aside an order made *ex parte* on a proper case being substantiated. Mr. Sanyal contends that the sale in the present case being conditional in the sense that it was subject to the confirmation by the Court it was open to the Court to refuse to confirm it when the appellants' applied for leave to pay the balance of the decretal amount. This argument necessarily assumes that the order passed by Mitter J., on May 9, 1958, was a conditional order. In our opinion this assumption is not well-founded. The said order no doubt gave an opportunity to the appellants to pay the decretal amount in the manner prescribed by it but it clearly provided that in default of the appellants complying with the said conditions within the respective due dates the sale of the property by the receiver to respondent 2 be confirmed and that the said receiver do make over possession of the said property to the said purchaser. It is clear that this order is not conditional order at all. It is a composite order. It provided for the payment of the decretal amount by the appellants and in that sense gave an opportunity to the appellants to avoid the sale of their property ; but, on the other hand, it also provided that on their default to comply with the order the sale do stand confirmed and the receiver do make over the possession of the property to the purchaser. Therefore, in our opinion, there is no scope for applying the principle laid down by Woodroffe, J., in the case of *S. M. Sudevi Devi*[1].

Before we part with this appeal we may very briefly indicate the nature of the divergence of views expressed in the Calcutta High Court on the question about the character of sales held by receivers appointed by Courts to which our attention has been invited.

In *Minatoonnessa Bibee & Others* v. *Khatoonnessa Bibee and Others*[2], Mr. Justice Sale held that the purchaser at a receiver's sale is entitled to obtain the assistance of the Court in obtaining the possession under the provisions of the Code relating to sales in suits. In coming to this conclusion the learned Judge referred to a precedent in the Calcutta High Court in that behalf, and made an order for possession of the property in favour of the receiver. It may be pointed out that the learned Judge, in dealing with the question, has referred to the important fact that in that particular case the sale had been already treated as a sale by the Court inasmuch as the Registrar had been directed under the provisions of the Code to execute the conveyance on behalf of some of the parties to the suit. Thus the question was in a sense *res judicata*. However, in dealing with the general question the learned Judge has no doubt observed that sales by receivers

"are in all essential particulars similar to sales by the Registrar, and that if they are sales by a civil Court in a suit the procedure prescribed by the Code for sales in a suit would be applicable",

We do not think that these observations should be divorced from the facts of the particular case with which the learned Judge was dealing, and read as laying down a general proposition that sales held by receivers attract the application of all the provisions in the Code in regard to sales held by the Court. If such a proposition was really intended to be laid down, we would hold that it is not correct at least in regard to the provisions of Order 21, rule 89.

1. (1906) 10 C.W.N. 306. 2. (1894) I.L.R. 21 Cal. 479.

In *Golam Hossein Cassim Ariff* v. *Fatima Begum*[1], Fletcher, J., has taken a contrary view. He has held that

"a sale by a receiver under the direction of Court is not a sale by Court and in such a sale the Court does not grant a sale certificate nor does it confirm the sale".

The learned Judge referred to the earlier decision of Sale J., and dissented from him. It is unnecessary for us to consider the correctness or otherwise of this decision.

Fletcher, J., adhered to the same view in *Jogemoya Dasee* v. *Akhoy Coomar Das*[2]. In that case the learned Judge was dealing with the sale of prperties by the Commissioner of Partition, and he held that such a sale is not one by the Court but is one made by the Commissioner of Partition under the authority of the Court.

Chaudhuri, J., considered the same question in *Bazir Ali* v. *Hafiz Nazir Ali*[3] and held that in all sales whether by the Court or under the Court or by direction of the Court out of Court the purchaser is bound to satisfy himself of the value, quality and title of the thing sold just as much as if he were purchasing the same under a private contract. According to this decision the sales certificate does not transfer the title. It is evidence of the transfer. Accordingly he directed the receiver to execute a conveyance in favour of the purchaser. This decision is not quite consistent with the view taken by Fletcher, J.

In *Rani Bala Bose and Others* v. *Hirendra Chandra Ghose and Others*[4], Chakravarti, J., as he then was, has incidentally referred to this conflict of judicial opinion in the Calcutta High Court, and has indicated his preference for the view taken by Sale J., though he has been careful enough to add that he was not deciding the point and that the case with which he was concerned was not covered by the actual decision of Fletcher, J.

These decisions show that there has been a divergence of opinion as to the character of the sale held by a Receiver as to whether it is a sale by the Court, or under the Court, or under the directions of the Court. It is because our attention has been invited to these decisions that we have thought it necessary to make it clear that our present decision is confined to the narrow question as to whether the sale held by a receiver attracts the provisions of Order 21, rule 89. We hold that rule 89 of Order 21 does not apply to such a sale and that the High Court was right in rejecting the appellant's claim based on the said rule.

The result is, the appeal fails and is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. SUBBA RAO AND J. C. SHAH, JJ.

Ct. A. Ct. Nachiappa Chettiar and others .. *Appellants**

v.

Ct. A. Ct. Subramaniam Chettiar .. *Respondent.*

Arbitration Act (X of 1940), section 21—Scope—Appeal against preliminary decree pending—Trial Court—If can refer disputes to arbitration.

"Court" in section 21 of the Arbitration Act includes the appellate Court, proceedings before which are generally recognised as continuation of the suit, and the word "suit" will include such appellate proceedings. It is open to the trial Court to refer to arbitration any matters of difference between the parties to the suit provided they agree and apply at any time before the Court pronounces its final judgment in the suit. The fact that a preliminary decree has been drawn up and it was based upon a judgment delivered by the Court cannot exclude the application of section 21. That judgment is not a final judgment contemplated by section 21. Where there is an appeal pending

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1. (1910) 16 C.W.N. 394.
2. (1913) I.L.R. 40 Cal. 140.
3. (1916) I.L.R. 43 Cal. 124.
4. (1948) 52 C.W.N. 739.

* Civil Appeals Nos. 112 to 116 of 1955.

13th November, 1959.

against the preliminary decree and proceedings subsequent to preliminary decree are pending before the trial Court it would be open to either the appellate Court or the trial Court to make an order of reference in respect of all the matters in dispute between the parties.

Appeals from the Judgment and Order, dated the 14th December, 1951, of the Madras High Court, in A.A.O. No. 210 of 1946, C.M.Ps. Nos. 3273 and 3274 of 1946, A.A.O. No.661 of 1946, and A.A.O. No. 49 of 1947† respectively, arising out of Judgment and Order, dated the 28th January, 1946, of the Subordinate Judge, Devakotah, in I.A. No. 18 of 1945 in O.S. No. 91 of 1941.

A. V. Viswanatha Sastri, Senior Advocate (*K. Parasaran* and *M. S. K. Aiyangar*, Advocates, with him), for Appellants.

K. Rajah Iyer, Senior Advocate (*R. Rangachari* and *R. Ganapathy Iyer*, Advocates with him), for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, J.—These five appeals arise from a partition suit (O.S. No. 91 of 1941) filed by the respondent Subramanian Chettiar against his brother Ct. A.Ct. Nachiyappa Chettiar and his four sons, appellants 1 to 5 respectively, in the Court of the Subordinate Judge of Devokottai, and they have been brought to this Court with a certificate granted by the High Court of Madras under Article 133 of the Constitution. The principal appeal in this group is Civil Appeal No. 112 of 1955 and the questions which it raises for our decision relate to the validity of the award made by the arbitrators to whom the matters in dispute between the parties were referred pending the present litigation. It would, however, be convenient at the outset to state broadly the material facts leading to the suit and indicate the genesis and nature of the five respective appeals.

The appellants and the respondent belong to the Nattukottai Chettiar community and their family which is affluent had extensive money-lending business in Burma. Chidambaram Chettiar, the father of appellant 1 and the respondent, died on August, 20, 1926. At the time of his death the respondent was an infant, 6 years of age. Appellant 1 had already been associated with his father in the management of the business and on his father's death he became the manager of the family and took charge of its affairs and business. On September 6, 1941, the respondent gave notice to appellant 1 calling upon him to effect a partition and to render accounts of his management and the properties of the family. This demand was not complied with and so the respondent instituted the present suit on September 24, 1941.

According to the plaint the assets of the family consisted of immoveable properties in India which was then described as British India and in Pudukottai, an Indian State. These consisted of Items Nos. 1 to 12 and Item No. 13 respectively in Schedule 'A'. The jewels and moveables belonging to the family were set out in Schedule 'B' whereas two money-lending firms which the family owned and conducted at Minhla and Sitkwin in Burma were set out in Schedules 'D' and 'E' respectively. The plaint further alleged that Chidambaram Chettiar had entered large amounts belonging to the family in the names of the members of the family in what are called Thanathu maral accounts and these amounts were invested in various firms or lent to several individuals. The total of these investments came to about Rs. 15,00,000 described in Schedule 'C'. The assets thus described in Schedules 'C', 'D' and 'E' included immoveable properties in Burma and the respondent claimed a half-share in all of them. It appears that the family had endowed several properties in favour of charities and they were described in Schedule 'F'. The respondent claimed that in effecting partition between the parties a scheme should be framed for the management of the said respective charities. According to the respondent-appellant 1 had in the course of his management manipulated accounts and had in fact misappropriated large amounts, and so he

† (1952) 2 M.L.J. 524.

claimed an account from appellant 1. That in brief is the nature of the claim made by the respondent in his plaint.

At the date of the suit appellants 3 to 5 were minors and they were represented by appellant 1. It appears that a written statement was filed by appellant 1 for himself and as guardian of his minor sons in which the relationship of the respondent and his half share to the family properties were admitted. Several contentions were, however, raised with reference to the properties available for partition. It was alleged that Items Nos. 10 and 11 in Schedule 'A' were dedicated to charity and as such not divisable and that Item No. 3 was being used as a school. The written statement referred to some more properties which had not been included in the plaint though they were liable to partition. In regard to the jewels and moveables it was contended that several items not belonging to the family, and some not even in existence, had been shown in the said schedule. It was also alleged that some of the jewels shown in the said schedule belonged to the several appellants as their separate property. Then as regards the Thanathu maral accounts the appellants gave a detailed history of the amounts and their investments. It was admitted that the said amounts belonged to the family though the investments had been made in the names of the different members of the family. It was, however, urged that the total value of the assets enumerated in Schedule 'C' would be only Rs. 9,00,000 and not Rs. 15,00,000 as alleged by the respondent. The respondent's case that appellant 1 had manipulated accounts and misappropriated family funds was denied, and it was urged that for the purpose of partition the assets of the family as they stood on the date of the partition should be taken into account. The appellants also pleaded that the Court had no jurisdiction to divide the immoveable properties situated in Burma. According to them there was a special practice obtaining among the families of the Nattukottai Chettiar community according to which appellant 1 was entitled to a decent remuneration for the management of the joint family business and properties. According to another custom pleaded by the appellants it was alleged that provision had to be made for future Seermurais for the unmarried daughters of the family. Broadly stated these were the pleas raised by appellants 1 and 3 to 5. Appellant 2 who was a major filed a separate written statement generally adopting the written statement filed by appellant 1; nevertheless he put the respondent to the strict proof of the allegations made by him in the plaint in support of his claim.

In reply to the contentions thus raised by the appellants the respondent filed a reply. In this statement he pleaded *inter alia* that there was a custom amongst the community for a member of the joint family to set up a separate family after marriage and that monies drawn by him thereafter would be entered in a separate account called Pathuvazhi and that at the time of the partition the amounts appearing in the said account would be debited to the said member. The respondent claimed that account should be made in accordance with this custom in effecting the partition of the family. On these pleadings the learned trial Judge framed fifteen issues.

It appears that an attempt was made by the parties to have their disputes referred to arbitration, and in fact a reference was made on April 6, 1943, but this attempt proved abortive and the suit was set down for hearing before the Court, and the hearing actually commenced on December 11, 1943. Meanwhile, on December 6, 1943, appellant 2 filed an application under Order 8, rule 9 of the Code of Civil Procedure for permission to file an additional written statement. This application was numbered as I. A. No. 988 of 1943. It would be relevant to refer to the plea which appellant 2 sought to raise by this application. He alleged that the deceased Chidambaram Chettiar had set apart on March 25, 1925, two sums of money of Rs. 2,10,251-4-0 each separately in the name of the respondent and appellant 1 so as to vest the same in them fortwith, and he urged that these amounts and their accretions were not properties of the family liable to partition in the suit. This application was opposed by the respondent. On December 14, 1943, the trial Judge dismissed the said application on the ground that it sought to raise a new and inconsistent plea and that had been really inspired by appellant 1.

Against this decision three appeals were preferred before the High Court of Madras. A.S. No. 115 of 1944 was filed by appellant 2 and No. 199 of 1944 by appellants 1, 3 to 5, whereas A.S. No. 499 of 1944 was filed by the respondent. It appears that under his appeal No. 115 of 1944 appellant 2 made an application for stay of further proceedings before the Commissioner (C.M.P. No. 1402 of 1944). On this petition the High Court ordered that there was no need to stay all proceedings before the Commissioner and that it would be enough if the passing of the final decree alone was stayed. As a result of this order interim stay which had been granted *ex parte* was vacated. After the final order on this application was passed the Commissioner commenced his enquiry, but before the enquiry could make any progress the parties decided to refer their disputes for arbitration.

Accordingly on July 18, 1944, a joint application was field by the parties before the trial Judge requesting him to refer to the arbitration of Mr. VE. RM. AR. Ramanathan Chettiar of Kandanoor and RM. AN. S. RM. Chellappa Chettiar of Kothamangalam "all matters in dispute in the suit and all matters and proceedings connected therewith". An application under Order 32, rule 7, was also filed since three of the parties to the dispute were minors. On July 21, 1944, the trial Court allowed the said application and certified that the proposed reference was for the benefit of the minors and so referred " the matters in dispute in the suit and all matters and proceedings connected therewith " for determination by the two arbitrators named by the parties.

The arbitrators then began their proceedings and made an interim award on August 1, 1944. It was followed by their final award on December 6, 1944. This award was filed in the trial Court.

On January 3, 1945, the appellants filed a petition (I.A. No. 18 of 1945) under sections 30 and 31 of the Indian Arbitration Act (hereinafter called the Act). By this petition the appellants urged that the award should be set aside on the grounds enumerated by them in the petition. Their case was that the reference to arbitration had been brought about by coercion and undue influence, that the arbitrators had not held any proper enquiry and that they were partial and biased. Thus the award was sought to be set aside on the ground that the reference was bad and that the arbitrators were guilty of misconduct. The validity of the award was also challenged on the ground that both the reference and the award were invalid because they contravened the principle of private international law that Courts in one country would have no jurisdiction to adjudicate on title to immoveable property situated in a foreign country or to direct its division; the reference and the award dealt with immoveable properties in Burma and so they were invalid. The appellants further contended that the reference to arbitration was opposed to the orders passed by the High Court in C.M.P. No. 1402 of 1944, and as such it was invalid.

This application was resisted by the respondent. He traversed all the allegations made by the appellants and claimed that a decree in terms of the award should be passed. As the hearing of this petition no oral evidence was led by the parties; they were content to base their case on the documents produced on the record and on points of law raised by them.

The trial Judge rejected the appellants' case about the alleged misconduct of the arbitrators. He also found that there was no substance in the contention that the reference was the result of undue influence or coercion. He was satisfied that the arbitrators had made a proper enquiry and that the award was not open to any objection on the merits. He, however, held that the reference to the arbitrators which included matters in dispute in the suit comprised questions of title in relation to immoveable properties in Burma, and so it was without jurisdiction and invalid. In his opinion the reference also included the dispute relating to the sum of Rs. 2,10,251-4-0 which had been entered in the Thanathu maral accounts of appellant 1 and the respondent and that this part of the reference contravened the order passed by the High Court in C.M.P. No. 1402 of 1944. He

thus upheld these two contentions raised by the appellants and set aside the reference and the award. It was against this order that the respondent preferred C.M.A. No. 210 of 1946.

The High Court has allowed the respondent's appeal. It has confirmed the findings of the trial Court in respect of the pleas raised by the appellants as to the misconduct of the arbitrators and as to the invalidity of the reference on the ground that it was the result of coercion and undue influence. It has, however, reversed the conclusion of the trial Court that the reference and the award were invalid nasmuch as they related to immoveable properties in Burma and contravened the stay order passed by the High Court. The High Court has construed the order by which reference was made to the arbitrators in the present proceedings as well as the award and has held that they are not open to be challenged on either of the two grounds urged by the appellants. It was also urged before the High Court that the order of reference was invalid because under section 21 of the Act the trial Court was not competent to make the reference; this contention has been negatived by the High Court. In the result the High Court has found that the reference and the award were valid and it has directed that a decree should be passed in terms of the award. It is against this decision that Civil Appeal No. 112 of 1955 arises; and, as we have already mentioned, the questions which it raises relate to the validity of the award on which the two Courts have differed. Before we deal with the merits of these points, however, we may indicate how the other appeals arise.

In A.S. No. 115 of 1944 filed by appellant 2 before the High Court the appellant presented Miscellaneous Application C.M.P. No. 2374 of 1946 under Order 23, rule 3 for an order that the interim award (Exhibit P. 15) passed by the arbitrators which had been signed by all the parties in token of their consent should be treated as a compromise and a decree passed in accordance with it under Order 23, rule 4. The High Court has observed that in view of its decision in C.M.A. No. 210 of 1946 it was really unnecessary to pass any order in this appeal; but it thought that since the matter was likely to go in appeal to this Court it would be better to make a formal order and direct that a decree in terms of the interim award should be drawn under Order 23, rule 3. Against this decision the appellants have preferred Civil Appeal No. 116 of 1955 in this Court.

The appellants had made a similar application in A.S. No. 199 of 1944 and it was numbered as C.M.P. No. 3273 of 1946. The High Court has allowed this application for similar reasons and its decision has given rise to Civil Appeal No. 115 of 1955.

In the trial Court the appellants had filed two similar applications under Order 23, rule 3; but they had been rejected by the trial Court; these orders had given rise to two appeals in the High Court, C.M.A. No. 661 of 1946 and C.M.A. No. 49 of 1947. The High Court has allowed these appeals and has ordered that a decree in terms of compromise should be passed under Order 23, rule 3. Against the orders thus passed by the High Court in these two appeals Civil Appeals Nos. 113 and 114 of 1955 have been filed in this Court. That is the genesis and nature of the four subsidiary appeals in the group. We will now revert to the points which arise for our decision in the principal Civil Appeal No. 112 of 1955.

The first ground on which the validity of the reference and the award is challenged is based on the assumption that the reference involved the determination of the title to immoveable properties situated in Burma and/or that the award has actually determined the said question of title. The appellants contend that there can be no doubt that Courts in this country have no jurisdiction to determine questions of title in respect of immoveable properties in foreign countries or to direct a division thereof. This position is not and cannot be disputed. The rule of law on this subject has been thus stated by Dicey: "The Courts of a foreign country have no jurisdiction to adjudicate upon the title or the right to the possession of any immoveable property not situate in such country"[1]. It is also urged that where a

1. Dicey's "Conflict of Laws", 6th Ed., pages 141 and 348.

Court has no jurisdiction to determine any matter in controversy such as the question of title in respect of the foreign immoveable property it has no jurisdiction to refer it for the determination of the arbitrators. This position also is not and cannot be disputed. The appellants further argued that if the reference includes properties over which the Court had jurisdiction as well as those over which it had no jurisdiction the whole of the reference becomes invalid and in such a case it is not permissible to separate the invalid part of the reference from that which is valid. The correctness of this contention is disputed by the respondent; but, for the purpose of the present appeal the respondent is prepared to argue on the assumption that even this contention is well-founded. The respondent's case is that neither the reference nor the award purports to deal with any immoveable property in Burma; and so the challenge to the validity of the reference and the award on the legal points raised by the appellants cannot succeed. It is, therefore, necessary to examine the reference and the award and decide whether the factual assumption made by the appellants in urging their legal grounds against the validity of both the reference and the award is justified.

It dealing with this question it is necessary first to ascertain the scope of the request made by the parties when they applied to the trial Court for reference of their dispute to arbitration. In their application (Exhibit P. 12) the parties have briefly indicated the nature of the respondent's claim and have stated that the dispute between the parties was then pending before the High Court in the form of three appeals preferred by them. Then it is averred that appellants 3 to 5 are minors but it is added that the proposed reference was for their benefit and so another application had been separately made for the Court's sanction to the said reference in respect of the said minors. "The parties desire and agree", said the application, "that all matters in dispute in this suit and all matters and proceedings connected therewith should be referred to the unanimous decision of the two named arbitrators." They had also agreed that they would abide by the unanimous decision of the arbitrators and that the arbitrators should be empowered to partition the properties of the joint family between the parties and if necessary also by payment of monies to equalise the shares and to take the necessary accounts and to decide all matters in dispute between them including costs. The parties had further agreed to produce their own papers and copies before the arbitrators and that if the arbitrators needed any further papers, accounts or documents which had been filed in Court they should be authorised to require the Commissioner to send them to the arbitrators. It is on this application that the Court made the order that "all matters in dispute in this suit and all matters and proceedings connected therewith" be referred for determination to the two named arbitrators. The question which arises for our decision is: What was the scope and extent of the matters thus referred to arbitration? In other words, did this order of reference include the respondent's claim for a share in the immoveable properties in Burma?

The appellants contend that the order of reference includes not only all matters in dispute in the suit but also all matters and proceedings connected therewith and their case is that these clauses are wide enough to include the respondent's claim for a share in the immoveable properties in Burma. There is no doubt that the latter clause refers to matters and proceedings connected with the suit; but the appellants' contention can be upheld only if it is shown that the respondent's claim for a share in the properties in Burma was connected with the suit or was a part of the matters connected with it at the material time.

What then was the nature and extent of the dispute between the parties at the material time? Let us examine the pleadings of the parties, the issues framed by the trial Court, the decision of the trial Court on them and ascertain the nature and extent of the subsisting dispute between them which was pending in the High Court in the three respective appeals. There is no doubt that in his plaint the respondent had claimed a share in the immoveable properties in Burma. In regard to this claim his allegation was that with the aid of the advances made by the

family firms in Burma and of those in the accounts described as Thanathu maral accounts, lands and other properties had been purchased and they formed part of the assets of the firms and the Thanathu maral accounts. The written statement filed by appellant 1 admitted that there were Thanathu maral transactions during the lifetime of Chidambaram Chettiar and that all sums taken from the family assets, though invested for the sake of convenience in the name of one or the other member of the family, belonged to the family and had been treated as family assets. According to the appellants, however, the extent of the Thanathu maral transactions had been exaggerated by the respondent. On the whole the written statement clearly admitted that the branches of appellants 1 to 5 on the one hand and of the respondent and his son on the other are entitled to a half-share each; but they pleaded that the said shares have to be allotted only after making some provisions out of the joint family funds for the payments of the future Seerumurai etc., due to the unmarried daughters in the family. They also contended that the Court had no jurisdiction to divide the immoveable properties in Burma though it was admitted that the respondent was entitled to the relief in respect of the division of the family assets as set forth in the written statement. This written statement was adopted by appellant 2 though in a general way he denied the allegations in the plaint which had not been expressly admitted by him in his written statement. It would thus be seen that the respondent's share in the family properties was not in dispute nor was his share in the properties in Burma seriously challenged. The only pleas raised in respect of the latter claim was that the Court had no jurisdiction to deal with it. This state of the pleadings in a sense truly reflected the nature of the dispute between the parties. It is common ground that the family is a trading family and there could be no doubt that the assets of the family were partible between the members of the family. It was on these pleadings that the trial Judge framed fifteen issues and set down the case for hearing.

At this stage appellant 2 wanted to go back upon his written statement by making further and additional pleas. That is why he filed an application (Exhibit P-3 (*a*)) for leave to file an additional written statement. As we have already mentioned this application was rejected by the trial Court; but for our present purpose it is relevant to consider the pleas which he wanted to raise by this additional statement. He wanted to contend that the amounts set apart in favour of appellant 1 and the respondent respectively by their father remained invested distinctly and separately during his lifetime and that in law they ought to be taken to be separate properties belonging to the two respective branches. In other words, the plea thus sought to be raised was that by reason of the investment of the amounts in the names of appellant 1 and the respondent respectively the said amounts constituted the individual and separate monies of the respective persons and became the separate properties of their branches. Appellant 2 thus raised a contention about the character of the amounts invested by the deceased Chidambaram Chettiar in the two names of his sons respectively and in that sense the issue which he sought to raise was in regard to the character of the amounts themselves. It had no direct reference to any immoveable properties in Burma.

Since the trial Court refused to allow appellant 2 to raise this additional plea he proceeded to try the issues already framed by him, and, as we have already indicated, he held that he had no jurisdiction to deal with immoveable properties in Burma and appointed a Commissioner to make an enquiry in pursuance of the preliminary decree. The preliminary decree in terms excluded from its operation the immoveable properties in Burma as well as in the Indian State of Pudukottai. In the proceedings before the Commissioner parties agreed that the properties in Burma and Pudukottai should be left out of account and so no dispute appears to have been raised before him that the accounts of the firms in Burma should be taken by him.

In the appeal filed by the respondent against this preliminary decree he did not challenge the decision of the trial Court that he had no jurisdiction to deal with

immoveable properties out of British India. His appeal raised some other points which it is unnecessary to mention. This fact is very significant. It shows that the respondent accepted the finding of the trial Court and did not want the High Court to consider his claim for a share in the excluded properties. In the appeal preferred by appellant 2 he had urged *inter alia* that the trial Court should have allowed him to raise the additional pleas and it appears that he had also raised a point that the trial Court had no jurisdiction to direct a division of the immoveable properties of the firms in Burma. The grounds taken by appellant 2 in his memo. leave no manner of doubt that none of the pleas which he sought to raise before the High Court had any reference to immoveable properties in Burma. It is, therefore, clear that in none of the three appeals pending before the High Court was it urged by any party that the immoveable properties in Burma should be brought within the scope of the partition suit.

The application made by the parties for arbitration to which we have already referred has deliberately set out the pendency of the three appeals in the High Court at the material time in order to furnish the background for determining the extent and nature of the dispute which was sought to be referred to arbitration. The respondent's claim for a share in the properties outside India had been negatived by the trial Court and the decision of the trial Court had become final because it was not challenged by the respondent and so there can be no doubt that the said claim was outside the purview of the dispute which was then pending between the parties in the High Court. It was not, and could not have been, intended to be a matter in dispute in the suit between the parties or any matter and proceedings connected therewith. Therefore we are satisfied that the High Court was right in coming to the conclusion that the reference did not include any claim with regard to the immoveable properties in Burma.

It is, however, urged that the reference did include the points raised by appellant 2 in his appeal before the High Court ; and that no doubt is true. But what is the effect of the said grounds raised by appellant 2 ? As we have already pointed out the said grounds did not raise any question about immoveable properties in Burma. They merely raised a dispute about the character of amounts invested bythe deceased Chidambaram Chettiar in the names of appellant 1 and the respondent respectively. It was a dispute in regard to monies or moveables and so appellant 2 was driven to contend that the trial Court had no jurisdiction to deal with such moveables. This contention is obviously without substance and has not been raised either in the Courts below or before us. The only argument raised is that the reference included claims in regard to immoveable properties in Burma and this argument cannot be supported on the ground of the pendency of the appeal by appellant 2 before the High Court because, even if the said appeal was allowed, it could have no reference to any immoveable properties in Burma. Thus the attack against the reference on the ground that it included immoveable properties in Burma must fail.

Does the award deal with the said immoveable properties in Burma ? That is the next question which falls to be considered. If it does, it would be invalid not only because it purports to deal with foreign immoveable properties but also for the additional reason that it is in excess of the terms of reference. At the hearing of the present appeals in this Court Mr. Viswanatha Sastri, for the appellants, attempted to criticise the decision of the arbitrators on several grounds ; but we did not allow him to raise any contentions against the merits of the award because both the Courts below have rejected the appellant's objections in that behalf, and in view of their concurrent findings it would not be open to the appellants to raise the same points over again. That is why we would confine ourselves to those portions of the award which, according to the appellants, show that the arbitrators divided the immoveable properties in Burma and Pudukottai.

In regard to the properties in Pudukottai this is what the award says in paragraph 3 :

"The plaintiff and the defendants shall enjoy them in equal halves as under marukkal kuttu. In proportion to their respective shares, the plaintiff shall pay one-half of the taxes and the defendants 1 to 5 the other half. Since the aforesaid property has been situate in Pudukottai State it has not been divided on the good and bad qualities of the soil ; if it is necessary, the plaintiff and the defendants shall have it devided in equal halves, later on when required".

In regard to the properties in Burma, paragraph 1 of the award recites that

"after communications are resorted in Burma the plaintiff and the defendants have to divide the firms in Burma at the places Minhla and Sitkwin belonging to them and the lands, godowns, homes, gardens and the properties items, bank deposits, jewels, moveables, all assets, etc., and the subsequent income attached thereto into two halves, and the plaintiff has to take one half and the defendants the other half".

Paragraph 2 adds that since both the parties have agreed to divide the moveable properties attached to the said shop later on the arbitrators had not divided them. The award has also stated that the sale deeds at Alagapuri and relating to the lands attached to the said firms have been divided into two lots and for the purpose of safe custody two lists, known as Schedules A and B have been prepared and both parties have signed the lists. Later on, at the time of division of the said lands, firms and assets, all the documents shall be collected together and the parties shall take the documents relating to their respective shares.

The arbitrators then dealt with the additional plea sought to be raised by appellant 2, and in substance they refused appellant 2 permission to raise that plea because they thought that having regard to the conduct of the parties it was futile to raise such a plea. That is why they directed that

"the plaintiff's branch and the defendant's branch have shares in all the amounts and they added that their conduct fully justified the said conclusion and the parties agreed to it".

It is these portions of the award on which the appellants based their contention that immoveable properties in Pudukottai and Burma have been dealt with by the arbitrators. In our opinion this contention is not well-founded. What the arbitrators have done is to divide the properties which were then the subject-matter of the dispute between the parties ; and having done so they have indicated what the legal position of the parties would be in respect of the properties outside the dispute. In appreciating the effect of the words used in the award we must bear in mind that the arbitrators were laymen not familiar with the technical significance of legal expressions, and so we must read the relevant clauses as a whole with a view to determine what in effect and substance they intended to decide. Now take the recitals in the award to the Pudukottai properties. The award expressly states that the properties had not been divided by them and that the plaintiff and the defendants shall have them divided when so required. All that the award says is that since the parties had separated and the properties in suit before the arbitrators had been actually divided by metes and bounds, the two branches shall enjoy the Pudukottai properties in equal halves. This clause in the award cannot be said to divide the said properties or even to determine their shares in them. The shares of the parties in the said properties were admitted and so the award merely says that as divided members they will hold and enjoy the properties half and half.

Similarly in regard to the properties in Burma the award expressly states that the said properties had not been divided and it merely refers to the true legal position that they would be enjoyed by the two branches half and half. The arrangement proposed by the arbitrators in respect of the immoveable properties in Burma is very significant. They merely asked the parties to hold the documents of title half and half for safe custody and they have added that when the parties decided to divide the properties all the documents would have to be brought together and a partition made according to law. That again is an arrangement dictated by commonsense and cannot be said to amount to a decision in any way. It is not as if the award declares the shares of the parties in respect of the properties. What it does is no more than to state the true and admitted legal position of the parties, rights in respect of the said properties.

In this connection it would be useful to refer to the observations made by Viscount Dunedin in *Bageshwari Charan Singh* v. *Jagarnath Kuari*[1]. In that case the Privy Council was called upon to consider the question about the admissibility of a petition which was relied upon as an acknowledgment of liability under section 19, sub-section (1) of the Limitation Act; and it was urged that the said petition was inadmissible because it purported or operated to create or declare a right to immoveable property and as such was compulsorily registrable under section 17 (1) (*b*) of the Registration Act, 1908. In urging the objection to the admissibility of the petition a large number of Indian decisions were cited before the Privy Council dealing with the word "declare" used in section 17 (1) (*b*) of the Registration Act, 1908; and it was apparent that there was a sharp conflict of views. In *Sakha Ram Krishnaji* v. *Madan Krishnaji*[2], West, J., had observed that the word "declare" in section 17 (1) (*b*) is placed along with 'create', 'assign' 'limit', or 'extinguish' a right, title or interest and these words imply a definite change of legal relation to the property by an expression of will embodied in the document referred to, and had added that he thought that is equally the case with the word "declare". On the other hand, certain other decisions had construed the word "declare" liberally in a very wide sense and it was on those decisions that the objection against admissibility of the petition was founded. In repelling the objection Lord Dunedin observed that

> "though the word 'declare' might be given a wider meaning they are satisfied that the view originally taken by West, J., is right. The distinction is between a mere recital of fact and something which in itself creates a title".

These observations assist us in deciding the question as to whether the impugned portions of the award declare the parties' rights in immoveable properties in the sense of deciding them as points or matters referred to arbitration. In our opinion, the High Court was right in answering this question against the appellants. Therefore the award is not open to the attack that it deals with immoveable properties out of the jurisdiction of the Court.

That takes us to the next ground of attack against the validity of the award. It is urged that the award contravenes the order passed by the High Court on the stay petition filed before it by appellant 2. There is, however, no substance in this contention. All that the High Court directed was that pending the final decision of the appeals before it a final decree should not be drawn. In fact the High Court clearly observed that there was no reason for staying all the proceedings pending before the Commissioner. That is the usual order made in such cases, and it is difficult to appreciate how this order has been contravened by reference to arbitration or by that award that followed it. The award is not and does not purport to be a final decree in the proceedings and the proceedings before the arbitrators substantially correspond to the proceedings of the enquiry which the Commissioner would have held even under the order of the High Court. Therefore this contention must also fail.

We must now consider another objection against the validity of the reference which has been seriously pressed before us. It is urged that the reference and the award are invalid because the trial Court was not competent to make the order of reference under section 21 of the Act. Section 21 reads thus:

> "Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference."

Two conditions must be satisfied before an application in writing for reference is made. All the interested parties to the suit must agree to obtain a reference and the subject-matter of the reference must be any matter in difference between the parties in the suit. When these two conditions are satisfied the application for re-

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1. (1932) I.L.R. 11 Pat. 272 : L.R. 53 I.A. 130 : 62 M.L.J. 296 (P.C.).
2. (1881) I.L.R. 5 Bom. 232.

ference must be made at any time before the judgment is pronounced. Thus broadly stated the construction of the section presents no difficulty. But when we analyse the implications of the two conditions and seek to determine the denotation of the word "Court", difficulties arise. What does the word "Court", mean in this section? According to the appellants "Court" means the Court as defined by section 2 (*c*) of the Act. Section 2 (*c*) defines the "Court" *inter alia* as

> "a civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit";

and this *prima facie* means the trial Court. The argument is that an order of reference can be made only by the trial Court and not by the appellate Court, and so there can be no reference after the suit is decided and a decree has been drawn up in accordance with the judgment of the trial Court. In the present case a judgment had been delivered by the trial Court and a preliminary decree had been drawn in accordance with it, and so there was no scope for making any order of reference. That is the first part of the argument which must be carefully examined.

Does the "Court" in the context mean the trial Court? This construction cannot be easily reconciled with one of the conditions prescribed by the section. After a decree is drawn up in the trial Court and an appeal is presented against it, proceedings in appeal are a continuation of the suit; and speaking generally, as prescribed by section 107 of the Code of Civil Procedure the appellate Court has all the powers of the trial Court and can perform as nearly as may be the same duties as are conferred and imposed on the trial Court. If that be so, during the pendency of the appeal, can it not be said that matters in difference between the parties in suit continue to be matters in dispute in appeal? The decision of the appeal can materially affect the nature and effect of the decree under appeal; and there is no doubt that all the points raised for the decision of the appellate Court can be and often are points in difference between them in the suit; and, in that sense, despite the decision of the trial Court the same points of difference in suit continue between the parties before the appellate Court. If during the pendency of such an appeal parties interested agree that any matter in difference between them in the appeal should be referred to arbitration the first two conditions of the section are satisfied. When section 21 was enacted did Legislature intend that during the pendency of the appeal no reference should be made even if the parties satisfied the first two conditions prescribed by the section?

In considering this question it would be relevant and material to take notice of the fact that prior to the passing of the Act in 1940 the longstanding practice of Indian Courts was to refer to arbitration disputes pending before the appellate Court between the respective parties to the appeals. If the object of enacting section 21 was to prohibit such reference at the appellate stage it would, as the High Court, has observed, cause 'a revolution in the existing practice'. Was such a revolution really intended? Having regard to the fact that the words used in section 21 are substantially the same as those used in Schedule II, paragraph 1, of the earlier Code, it would be difficult to sustain the plea that the enactment of section 21 was intended to bring about such a violent departure from the existing practice. If that had been the intention of the Legislature it would have made appropriate changes in the words used in section 21. Therefore the word "Court" cannot be interpreted to mean only the trial Ccurt as contended by the appellants. Similarly the word "suit" cannot be construed in the narrow sense of meaning only the suit and not an appeal. In our opinion "Court" in section 21 includes the appellate Court, proceedings before which are generally recognised as continuation of the suit; and the word "suit" will include such appellate proceedings. We may add that whereas section 41 of the Act is consistent with this view no other section militates against it.

The next question is: When can an application for reference be made? The section prescribes that it can be made at any time before the judgment is pronounced. It has been fairly conceded before us that the word "judgment"

cannot refer to the various interlocutory orders and judgments that may be passed during the hearing of the suit; and so the word "judgment" cannot be given the meaning assigned to it by section 2 (9) of the Code. It cannot mean in the context, the statement given by the Judge of the grounds of a decree or order. It must mean a judgment which finally decides all matters in controversy in the suit. Thus it follows that it is open to the parties to apply for a reference at any time before the final judgment is pronounced in the suit. If that be so, can the parties apply for an order referring matters in difference between them even though such matters may have been covered by interlocutory judgments delivered in the meanwhile? The appellants suggest that though reference to arbitration may be made at any time before the final judgment is pronounced the subject-matter of the reference must be such as is not covered by any decision of the Court pronounced in the meanwhile. This argument reads the word "judgment", as judgment in regard to a matter in difference between the parties; if a difference between the parties has been covered by an interlocutory judgment it can no longer be referred to arbitration; that is the the contention. We are not impressed by this contention. In our opinion, the scheme of the section does not permit the addition of any words qualifying the word "judgment" used in it. The expression "at any time before the judgment is pronounced" is only intended to show the limit of time beyond which no reference can be made, and that limit is reached when a final judgment is pronounced. The provision that "any matter in difference between the parties in the suit can be referred to arbitration" cannot be subjected to the further limitation that the said matter can be referred to arbitration if it is not covered by the judgment of the Court. The effect of the section appears to be that so long as the final judgment is not pronounced by the Court any matter—*i.e.*, some or all the matters—in difference between the parties can be referred to arbitration provided they are agreed about it. If a reference can be made even at the appellate stage when all matters in difference between the parties are covered byt he final judgment of the trial Court, it is difficult to understand why in allowing reference to be made during the pendency of the suit in the trial Court any further condition should be imposed that only such matters of difference can be referred to as are not covered by an interlocutory judgment of the Court. We would accordingly hold that it is open to the trial Court to refer to arbitration any matters of difference between the parties to the suit provided they agree and apply at any time before the Court pronounces its final judgment in the suit.

But this construction still leaves one question to be considered. Had a final judgment been pronounced by the trial Court in this case at the time when it passed the order of reference? It had delivered a judgment and a preliminary decree had been drawn up. A judgment delivered by a Court in a partition suit which is followed by a preliminary decree cannot be said to be a final judgment in the suit. Proceedings which parties may take pursuant to the preliminary decree are till a part of the suit, and it is only with the passing of the final decree that the suits comes to an end. As observed by the Privy Council in *Jadu Nath Roy and Others* v. *Parameswar Mullick and others*,[1] a partition suit in which a preliminary decree has been passed is still a pending suit with the result that the rights of parties who are added after the preliminary decree have to be adjusted at the time of the final decree. This position is not disputed. Therefore the fact that a preliminary decree had been drawn up in the present case and it was based upon a judgment delivered by the Court cannot exclude the application of section 21. The judgment which had been delivered by the Court is not a final judgment contemplated by section 21. The trial Court would, therefore, have jurisdiction to make the order of reference.

There is, however, another fact which introduces a complication; and that is the pendency of the three appeals before the High Court at the material time. As we have already observed the three appeals which were pending before the High Court raised before that Court matters in difference between the parties in the suit,

1. (1939-40) L.R. 67 I.A. 11 : (1940) 1 M.L.J. 97.

and to that extent the said matters of difference were really pending before the High Court and not before the trial Court. In such a case, which is the Court that has jurisdiction to make the order of reference? There is no difficulty in holding that if the suit is pending in the trial Court and a final judgment has not been pronounced by it, it is the trial Court which is competent to make the order of reference. Similarly, if a suit has been decided, a final judgment has been delivered and a decree had been drawn up by the trial Court and no appeal has been preferred against it, the matter is concluded and there is no scope for applying section 21 at all. On the other hand, if a decree determining the suit has been drawn up by the trial Court and it is taken to the appellate Court, during the pendency of the appeal, it is the appellate Court that is competent to act under section 21. These three cases do not present any difficulty; but where a preliminary decree has been drawn up and an appeal has been filed against it the complication arises by reason of the fact that the disputes between the parties are legally pending before two Courts. Proceedings which would have to be taken between the parties in pursuance of, and consequent upon, the preliminary decree are pending before the trial Court; whereas matters in difference between the parties which are covered by the preliminary judgment and decree are pending before the appellate Court. In such a case it may perhaps be logically possible to take the view that the arbitration in respect of the disputes in relation to proceedings subsequent to the preliminary decree can be directed by the trial Court, whereas arbitration in respect of all the matters concluded by the trial Court's preliminary judgment which are pending before the appellate Court can be made by the appellate Court; but such a logical approach is not wholly consistent with section 21; and rather than help to solve any difficulty it may in practice create unnecessary complications. In most cases matters in dispute before the trial Court in final decree proceedings are so inextricably connected with the matters in dispute in appeal that effective arbitration can be ordered only by one reference and not by two. We are, therefore, inclined to hold that in a case of this kind where both the Courts are possessed of the matters in dispute in part it would be open to either Court to make an order of reference in respect of all the matters in dispute between the parties. It is argued that on such a construction conflict of decisions may arise if two sets of arbitrators may be appointed. We do not think that such a conflict is likely to occur. If the parties move the trial Court and obtain an order of reference they would inevitably ask for appropriate orders of withdrawal or stay of the appellate proceedings, if, on the other hand, they obtain a similar order of reference from the appellate Court they would for similar reasons apply for stay of the proceedings before the trial Court. In the present case proceedings subsequent to the preliminary decree were pending before the trial Court and so we must hold that the trial Court was competent to act under section 21. On that view the objection against the validity of the reference based on the provisions of section 21 cannot succeed.

We may now briefly refer to some of the decisions to which our attention was invited. Before the Act was passed in 1940 the procedure for referring matters in dispute between the parties in pending suits was governed by the provisions of Schedule II to the Code of Civil Procedure. There appears to have been a consensus of judicial opinion in favour of the view that under Schedule II, paragraph 1, the appellate Court could make an order of reference in respect of matters in dispute between the parties in an appeal pending before it. A note of dissent had, however, been struck by a Full Bench of the Calcutta High Court in *Jugesseur Dey* v. *Kritartho Moyee Dossee*[1]. In that case the question for decision arose under the provisions of the Code of 1859 and the Full Bench held that an appellate Court had no power even by consent of parties to refer a case for arbitration under the arbitration sections of Act VIII of 1859 which applied only to Courts of original jurisdiction nor was such power conferred on an appellate Court by section 37 of Act XXIII of 1861. One of the reasons which weighed with Couch, C.J., who delivered the principal

1. 12 Beng.L.R. 266 (F.B.).

judgment of the Full Bench was that according to him neither reason nor convenience required that the appellate Court should refer a suit to arbitration after the matter had been decided by the trial Court. Kemp, J., who concurred with the decision, apprehended that

"if the parties are allowed to refer matters to arbitration after a case has been finally disposed of by a Court of justice such a proceeding might tend to bring lower Courts into contempt."

In our opinion this apprehension is not well-founded. Besides it is well-known that when parties agree to refer the matters in dispute between them in suit to arbitration they desire that their disputes should be disposed of untrammelled by the rigid technicalities of the Court procedure. A search for a short-cut by means of such arbitration sometimes takes the parties on a very long route of litigation but that is another matter.

The Calcutta view was dissented from by the Madras High Court in *Sangaralingam Pillai*[1], in somewhat emphatic words.

"Entertaining all respect for the opinions of the learned Judges of the High Court of Calcutta by whom the case of *Jugesseur Dey*[2], was decided",

observed the judgment,

"we are not convinced by the reason given in the judgment for holding that an appellate Court might not, with consent of the parties, refer the matters in dispute in the appeal to arbitration."

Having thus expressed their disapproval of the Calcutta view, the learned Judges proceeded to add that in the case before them an order of reference was sought for under section 582 of the Code of 1877 and they held that under the said provision the appellate Court is given the same powers and is required to perform the same functions as nearly as may be as the trial Court. The view thus expressed by the Madras High Court was subsequently accepted and approved by the Calcutta High Court in *Bhugwan Das Marwari and another* v. *Nund Lall Sein and another*[3], and *Suresh Chunder Banerjee* v. *Ambica Churn Mookerjee*[4]. As we have already observed, prior to the enactment of the Act there has been a longstanding judicial practice under which orders of reference have been passed by appellate Courts in respect of matters in dispute between the parties in appeals pending before them.

The construction of section 21 has led to a divergence of judicial opinion. In *Abani Bhusan Chakravarty and others* v. *Hem Chandra Chakravarty and others*[5], the Calcutta High Court has taken the view that the Court as defined in the Abritration Act does not include an appellate Court and consequently there is nothing in the Act which enables an appellate Court to refer to arbitration matters in dispute between the parties. This decision proceeds on the erroneous view that the "Court" in section 21 means only the Court as defined in section 2 (*c*) and that the considerations based on the powers of the appellate Court prescribed by section 107 are foreign to the Act. It also appears that the learned Judges were disposed to think that if the matter in dispute between the parties at the appellate stage was referred to arbitration it might tend to bring the lower Courts into contempt. There is no doubt that a Court cannot claim an inherent right to refer a matter in dispute between the parties to arbitration. Before a matter can be thus referred to arbitration it must be shown that the Court in question has been statutorily clothed with the power to make such an order; and that would depend on the construction of section 21 of the Act. The Calcutta High Court has construed the said section in substance consistently with the view taken by it in the case of *Jugesseur Dey*[2].

On the other hand the Patna High Court has taken a contrary view in *Thakur Prasad* v. *Baleshwar Ahir and others*[6]. Jamuar, J., who delivered the judgment of the Court, has considered the decision of the Calcutta High Court in the case of *Jugesseur Dey*[2], and has dissented from it. In the Allahabad High Court somewhat conflicting

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1. (1881) I.L.R. 3 Mad. 78.
2. 12 Beng. L.R. 266.
3. (1886) I.L.R. 12 Cal. 173.
4. (1891) I.L.R. 18 Cal. 507.
5. A.I.R. 1947 Cal. 93.
6. A.I.R. 1954 Pat. 106.

views had been expressed on different occasions ; but, on the question as to whether the appellate Court can refer a matter in dispute between the parties to arbitration or not, and whether the suit includes an appeal, the decision of the Full Bench of the Allahabad High Court in *Moradhwaj* v. *Bhudar Das*[1], seems to be on the same lines as that of the Patna High Court. This Full Bench also considered the question about the applicability of section 21 to execution proceedings but with that aspect of the matter we are not concerned in the present appeal. The Madras High Court has taken the same view in *Subramannaya Bhatta* v. *Devadas Nayak and others*[2]. However, none of these decisions had occasion to consider the question about the competence of both the trial Court and the appellate Court in cases where a preliminary decree has been passed and an appeal has been filed against the said decree. It would thus appear that the majority of the Indian High Courts have construed the words "suit" and "Court" used in section 21 liberally as including appellate proceedings and the appellate Court respectively. In the result we hold that the trial Court was competent to make the reference and its validity is not open to any objection.

That leaves only one point to be considered. It is urged by the appellants that the arbitrators acted illegally and without jurisdiction in directing the appellants to pay to the respondent Rs. 2,682-6-0 by way of interest on the amounts specified in the award up to December 5, 1944, and from that date at the rate of 5 as. per cent. per mensem, thus imposing on the appellants a total liability of Rs. 2,36,782-11-9. The appellants have also been directed to pay future interest on the same amount at 8 as. per cent. per mensem from the said date until the date of payment. This argument is based solely on the observations made by Bose, J., who delivered the judgment of this Court, in *Seth Thawardas Pherumal* v. *The Union of India*[3]. It appears that in that case the claim awarded by the arbitrators was a claim for an unliquidated sum to which Interest Act of 1839 applied as interest was otherwise not payable by law in that kind of case. Dealing with the contention that the arbitrators could not have awarded interest in such a case Bose, J., set out four conditions which must be satisfied before interest can be awarded under the Interest Act, and observed that none of them was present in the case ; and so he concluded that the abritrator had no power to allow interest simply because he thought that the payment was reasonable. The alternative argument urged before this Court that interest could be awarded under section 34 of the Code of Civil Procedure, 1908, was also repelled on the ground that the arbitrator is not a Court within the meaning of the Code nor does the Code apply to arbitrators. Mr. Viswanatha Sastri relies upon these observations and contends that in no case can the arbitrators award interest. It is open to doubt whether the observations on which Mr. Viswanatha Sastri relies support or were intended to lay down such a broad and unqualified proposition. However we do not propose to pursue this matter any further because the present contention was not urged before the High Court. It was no doubt taken as a ground of appeal but from the judgment it is clear that it was not urged at the time of hearing. Under these circumstances we do not think we would be justified in allowing this point to be raised before us.

The result is that the conclusion reached by the High Court is right and so its order that a decree should be drawn in terms of the award must be confirmed. Civil Appeal No. 112 of 1955 accordingly fails and is dismissed with costs. It is conceded that if the principal appeal fails it would not be necessary to make any effective orders on the rest of the appeals in this group. The said appeals also fail and are dismissed ; but there would be no order as to costs.

Appeals dismissed.

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1. A.I.R. 1955 All. 353.
2. (1955) 2 M.L.J.625: A.I.R. 1955 Mad. 693.
3. (1955) S.C.J. 445 : (1955) 2 M.L.J. (S.C.) 23: (1955) 2 S.C.R. 48.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT: B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. SUBBA RAO, K. C. GUPTA AND J. C. SHAH, JJ.

S. Kapur Singh .. *Appellant**

v.

The Union of India .. *Respondent.*

Public Servants (Inquiries) Act (XXXVII of 1850)—*Applicability to case of member of All India Civil Service—Order of dismissal—Prerequisites—Civil Services (Classification, Control and Appeal) Rules, rule* 55 —*Applicability—Constitution of India* (1950), *Article* 311—*Scope.*

The Public Servants (Inquiries) Act, 1850, seeks to regulate enquiries into the behaviour of superior public servants who are not removable from their appointment without the sanction of the Government; enquiries into the behaviour of members of subordinate services, who are appointed and are liable to be dismissed by authorities subordinate to the Government being excluded from the purview of the Act. There is no foundation for the submission that members of the Indian Civil Service, because they hold office during the pleasure of the President since the commencement of the Constitution, are employees of the President. They are and continue to remain employees of the Union or the State under which they are employed. By the Constitution, the executive power of the Union is conferred upon the President, and it is in exercise of that executive power that the President may dismiss a member of the Civil Service of the Union or of an all India service from his appointment.

Rule 55 of the Civil Services (Classification, Control and Appeal) Rules in express terms states that the enquiry contemplated therein is " without prejudice to the provisions of the Public Servants (Inquiries) Act, 1850 ". That rule does not support the submission that even if an enquiry be held under the Public Servants (Inquiries) Act, 1850, before an order of dismissal or removal or reduction is passed against a member of the Civil Service, another enquiry expressly directed under rule 55 shall be made.

A member of the Indian Civil Service, before disciplinary action is taken against him is therefore entitled by the force of the guarantees enshrined in the Constitution to an enquiry into his alleged misdemeanour either under the Public Servants (Inquiries) Act or under rule 55 of the Civil Services (Classification, Control and Appeal) Rules, in operation at the date of the Constitution. But the guarantee being one of an enquiry directed under one of two alternative powers, the exercise of authority under one of the two alternatives is not *prima facie* illegal.

Under either form of enquiry, the public servant concerned has to be given notice of the charges against him; he has to be supplied with the materials on which the charge is sought to be sustained and if he so desires, he may demand an oral hearing at which the witnesses for the prosecution and his own witnesses shall be examined.

The President of India was not bound before passing an order dismissing a Civil Servant to hear the evidence of witnesses. He could arrive at his conclusion on the evidence already recorded in the inquiry by the Enquiry Commission. By Article 311 of the constitution, a public servant is entitled to show cause against the action proposed to be taken in regard to him, but exercise of the authority to pass an order to the prejudice of a public servant is not conditioned by the holding of an enquiry at which evidence of witnesses *viva voce*, notwithstanding an earlier fair and full enquiry before the Enquiry Commission is recorded.

Appeal from the Judgment and Order, dated the 7th October, 1955 of the Punjab High Court in Civil Writ Petition No. 322 of 1953.

I. M. Lal, K. S. Chawla and *K. R. Krishnaswami*, Advocates for Appellant.

H. N. Sanyal. Additional Solicitor-Geheral of India and *N. S. Bindra*, Senior Advocate (*R. H. Dhebar* and *T. M. Sen*, Advocates, with them) for Respondent.

The Judgment of the Court was delivered by

Shah, J.—Sardar Kapur Singh (who will hereinafter be referred to as the appellant) was admitted by the Secretary of State for India in Council to the Indian Civil Service upon the result of a competitive examination held at Delhi in 1931. After a period of training in the United Kingdom, the appellant returned to India in November, 1933, and was posted as Assistant Commissioner, Ferozepore in the Province of Punjab. He served in the Province in various capacities between the years 1933 and 1947. In July, 1947, he was posted as Deputy Commissioner at Dharamsala and continued to hold that office till February 11, 1948, when he was

*Civil Appeal No. 230 of 1959. 15th December, 1959.

transferred to Hoshiarpur at which place he continued to hold the office of Deputy Commissioner till a few days before April 14, 1949. On April 13, 1949, the appellant was served with an order passed by the Government of East Punjab suspending him from service. On May 5, 1950, the appellant submitted a representation to the President of India protesting against the action of the Government of East Punjab suspending him from service and praying that he be removed from the control of the Punjab Government and that if any disciplinary action was intended to be taken against him, it be taken outside the Province of Punjab by persons appointed by the Government of India and in an atmosphere "free from prejudice and hostility". The Government of East Punjab on May 18, 1950, appointed Mr. Eric Weston, Chief Justice of the East Punjab High Court, as Enquiry Commissioner under the Public Servants (Inquiries) Act (XXXVII of 1850), to hold an enquiry against the appellant on twelve articles of charges. Notice was issued to the appellant of those charges. On November 5, 1950, at the suggestion of the Enquiry Commissioner, the Government of East Punjab withdrew charges Nos. 11 and 12 and the Enquiry Commissioner proceeded to hold the enquiry on the remaining ten charges. Charges 1, 2, 7, 8, 9 and 10 related to misappropriation of diverse sums of money received by or entrusted to the appellant, for which he failed to account. The third charge related to the attempts made by the appellant to secure a firearm belonging to an engineer and the unauthorised retention of that weapon and the procuration of sanction from the Government of East Punjab regarding its purchase. The fourth charge related to the granting of sanction under the Alienation of Land Act for sale of a plot of land by an agriculturist to a non-agriculturist, the appellant being the beneficiary under the transaction of sale, and to the abuse by him of his authority as Deputy Commissioner in getting that land transferred to his name, without awaiting the sanction of the Government. The fifth charge related to the grant to Sardar Raghbir Singh of a Government contract for the supply of 'fire-wood' without inviting tenders or quotations, at rates unreasonably high and to the acceptance of wet and inferior wood which when dried weighed only half the quantity purchased, entailing thereby a loss of Rs. 30,000 to the State. The sixth charge related to purchase of a motor car by abuse of his authority by the appellant and for flouting the orders of the Government, dated March 21, 1949, by entering into a bogus transaction of sale of that car with Messrs. Massand Motors and for deciding an appeal concerning that car in which he was personally interested.

Charges Nos. 1 to 4 and 7 to 10 related to the official conduct of the appellant when he was posted as Deputy Commissioner at Dharamsala and charges Nos. 5 and 6 related to the period when he was posted as Deputy Commissioner at Hoshiarpur.

The Enquiry Commissioner heard the evidence on behalf of the State at Dharamsala between July 31 and August 21, 1950. Enquiry proceedings were then resumed on September 5 at Simla and were continued till October 23 on which date the evidence on behalf of the State was closed. On October 27, the appellant filed a list of defence witnesses. A detailed written statement was filed by the appellant and he gave evidence on oath between November 28 and December 5. The defence witnesses were then examined between December 5 and December 28. It appears that the appellant did not, at that stage desire to examine any more witnesses, and the appellant's case was treated as closed on December 28. On and after December 28, 1950, the appellant filed several applications and affidavits for obtaining certain directions from the Enquiry Commissioner and for eliciting information from the State. On January 2, 1951, the Enquiry Commissioner adjourned the proceeding for the winter vacation. The proceedings were resumed on March 12, 1951, and after recording formal evidence of two witnesses, S. Gurbachan Singh, Sub-Inspector and Ch. Mangal Singh, Sub-Inspector about the statements made by certain witnesses for the defence in the course of the investigation which it was submitted were materially different from those made before the Enquiry Commissioner and after hearing arguments, the enquiry was closed. On May 14, 1951, the Enquiry Commissioner prepared his report. He held that the appellant had taken the amount referred to in charge No. 1 from the Government on the basis of a claim of Raja Harmohinder Singh which was made at the appellant's instance, that the appellant had also received

the amount which was the subject-matter of charge No. 2, that the appellant admitted to have received the amounts which were the subject-matter of charges Nos. 7, 9 and 10, that the amount which was the subject-matter of charge No. 8 was obtained by the appellant from the Government under a fraudulent claim sanctioned by the appellant with full knowledge of its true nature and that accordingly the appellant had received an aggregate amount of Rs. 16,734-11-6 and that even though he had made certain disbursements to refugees, the appellant had failed to account for the disbursement of the amount received by him or anything approximate to that amount and therefore the charge against the appellant for misappropriation must be held proved although the amount not accounted for could not be precisely ascertained. On charges 3 and 4, the Enquiry Commissioner did not record a finding against the appellant. On charge No. 6, he, recorded an adverse finding against the appellant in so far as it related to the conduct of the appellant in deciding an appeal in which he was personally concerned. He held that the conduct of the appellant in giving a contract to Sardar Raghbir Singh which was the subject-matter of charge No. 5 was an act of dishonest preference and the appellant knowingly permitted the contractor to cheat the Government when carrying out the contract and thereby considerable loss was occasioned to the Government for which the appellant was responsible.

This report was submitted to the Government of East Punjab. On February 11, 1952, the Secretary to the Government of India, Ministry of Home Affairs, supplied a copy of the report of the appellant and informed him that on a careful consideration of the report and in particular of the conclusions reached by the Enquiry Commissioner in respect of the charges framed, the President of India was of the opinion that the appellant was "unsuitable to continue" in Government service and that the President accordingly provisionally decided that the appellant should be dismissed from Government service. The appellant was informed that before the President took action, he desired to give the appellant an opportunity of showing cause against the action proposed to be taken and that any representation which the appellant may make in that connection will be considered by the President before taking the proposed action. The appellant was called upon to submit his representation in writing within twenty-one days from the receipt of the letter. The appellant submitted a detailed statement on May 7, 1952, which runs into 321 printed pages of the record.

The President consulted the Union Public Service Commission, and by order dated July 27, 1953, dismissed the appellant from service with immediate effect. The order passed by the President was challenged by a petition filed in the East Punjab High Court for the issue of a writ under Article 226 of the Constitution. The appellant prayed that a writ quashing the proceeding and the report of the Enquiry Commissioner and also a writ of *mandamus* or any other appropriate writ, Direction or Order commanding the Union of India to reinstate the appellant into the Indian Civil Service from the date of suspension be issued. By separate, but concurring judgments, Chief Justice Bhandari and Mr. Justice Khosla of the East Punjab High Court dismissed the petition. Against the order of dismissal of the petition, this appeal has been filed by the appellant pursuant to a certificate of fitness granted by the High Court.

Counsel for the appellant submitted that the order dismissing the appellant was liable to be set aside because the proceedings of the Enquiry Commissioner were without jurisdiction and were in any event vitiated because the Commissioner followed a procedure which was violative of the rules of natural justice. Counsel urged, (1) that the enquiry could not be directed by the Punjab Government as the appellant was a member of the Indian Civil Service and was not employed under the Goverment of East Punjab ; (2) that in any event, the enquiry could not be made under the Public Servants (Inquiries) Act, 1850, and could only be held under rule 55 of the Civil Services (Classification, Control and Appeal) Rules and the enquiry not having been held under that rule the order passed against the appellant was without jurisdiction ; (3) that the enquiry under the Public Servants (Inquiries) Act, 1850, violated the equal protection clause of the Constitution and was accordingly void;

and (4) that the enquiry Commissioner held the enquiry against the appellant in a manner contrary to the rules of natural justice in that the Commissioner did not allow the appellant sufficient opportunity to examine witnesses and to produce documentary evidence in support of his case. The order of dismissal by the President was challenged by the appellant on the plea that the President not having directed *viva voce* examination before him of witnesses whose evidence was recorded by the Enquiry Commissioner and not having given opportunity to the appellant to make an oral submission about the evidence led in the case and particularly the defence, the appellant was deprived of a reasonable opportunity of showing cause against the action proposed to be taken against him.

The appellant was admitted to the civil service under a covenant with the Secretary of State for India, but the special method of recruitment of the appellant to the service does not warrant the view that the appellant was not employed at the material date under the Government of East Punjab. By sub-section 2 of section 10 of the Indian Independence Act, 1947, in so far as it is material, it was enacted that every person appointed by the Secretary of State to a civil service of the Crown in India who continued on and after the appointed day to serve under the Government of the Dominion of India or of any Province or part thereof was entitled to receive the same conditions of service as respects remuneration, leave and pension and the same rights as respects disciplinary matters, or as the case may be as respects the tenure of his office. By sub-section 2 of section 240 of the Government of India Act as amended, a person appointed by the Secretary of State who continued in the establishment of the Dominion of India was not liable to be dismissed by any authority subordinate to the Governor-General or the Governor according as that person was serving in connection with the affairs of the Dominion or the Province. Indisputably, since India became a Republic, by Article 310 (1) of the Constitution, every person who is a member of a civil service of the Union or of an all-India service or holds any civil post under the Union, holds office during the pleasure of the President. But the power to dismiss a member of the civil service of the Union or of an all-India service may not be equated with the authority conferred by statute upon the State under which a public servant is employed to direct an enquiry into the charges of misdemeanour against him. By section 2 of the Public Servants (Inquiries) Act, 1850, it is provided that—

> "Whenever the Government shall be of opinion that there are good grounds for making a formal and public inquiry into the truth of any imputation of misbehaviour by any person in the service of the Government not removable from his appointment without the sanction of the Government, it may cause the substance of the imputations to be drawn into distinct articles of charge, and may order a formal and public inquiry to be made into the truth thereof",

and the expression 'Government' is defined by section 23 of the Act as meaning Central Government in case of persons employed under that Government and the State Government in the case of persons employed under that Government. The appellant was, at the date when enquiry was directed, employed under the East Punjab Government and there is nothing in the Constitution which abrogates the authority of the State to direct an enquiry under section 2 of the Act.

The submission of the appellant that the Act did not apply to enquiries against members of the Indian Civil Service is without force. The Act was, as the preamble recites, passed for regulating enquiries into the behaviour of public servants who are not removable from appointment without the sanction of the Government. The appellant, it is true entered service under a covenant with the Secretary of State for India in Council, but since the commencement of the Constitution of India, the Secretary of State had no authority in the matter of employment and dismissal of public servants employed in the civil service of the Union of India and the members of the Indian Civil Service who continue to remain employed in India hold office during the pleasure of the President, and are accordingly liable to be dismissed from service by the President. The Public Servants (Inquiries) Act, 1850, seeks to regulate enquiries into the behaviour of superior public servants who are not removable from their appointment without the sanction of the Government; enquiries into the behaviour of members of subordinate services, who are appointed and are liable to be

dismissed by authorities subordinate to the Government being excluded from the purview of the Act. There is no foundation for the submission that members of the Indian Civil Service, because they hold office during the pleasure of the President since the commencement of the Constitution, are employees of the President. They are and continue to remain employees of the Union or the State under which they are employed. By the Constitution, the executive power of the Union is conferred upon the President, and it is in exercise of that executive power that the President may dismiss a member of the Civil Service of the Union or of an all-India service from his appointment. Members of the Indian Civil Service are accordingly not liable to be dismissed from their appointment without the sanction of the Government and are not excluded from the purview of the Public Servants (Inquiries) Act, 1850.

Rule 55 of the Civil Services (Classification, Control and Appeal) Rules provides:

"Without prejudice to the provisions of the Public Servants (Inquiries) Act, 1850, no order of dismissal, removal or reduction shall be passed on a member of a Service (other than an order based on facts which have led to his conviction in a criminal Court or by a Court Martial) unless he has been informed in writing of the grounds on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself. The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the person charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required, within a reasonable time, to put in a written statement of his defence and to state whether he desires to be heard in person. If he so desires, or if the authority concerned so direct, an oral inquiry shall be held. At that inquiry oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called as he may wish, provided that the officer conducting the inquiry may, for special and sufficient reason to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof.

This rule shall not apply where the person concerned has absconded, or where it is for other reasons impracticable to communicate with him. All or any of the provisions of the rule, may in exceptional cases, for special and sufficient reasons to be recorded in writing, be waived, where there is a difficulty in observing exactly the requirements of the rule and those requirements can be waived without injustice to the person charged."

It was submitted relying upon that rule, that no order for dismissal or removal of a member of the Indian Civil Service can be passed unless an enquiry is held against him as prescribed by rule 55. But the rule in terms stated that the enquiry contemplated therein is "without prejudice to the provisions of the Public Servants (Inquiries) Act, 1850." The rule apparently means that an order of dismissal, removal or reduction in rank shall not be passed without an enquiry either according to the procedure prescribed by the Public Servants (Inquiries) Act, 1850, or the procedure prescribed by the rule. The Rule does not support the submission that even if an enquiry be held under the Public Servants (Inquiries) Act, 1850, before an order of dismissal or removal or reduction is passed against a member of the civil service, another enquiry expressly directed under rule 55 shall be made. The argument on behalf of the appellant proceeds upon an assumption which is not warranted by the language used, or by the context that the expression 'without prejudice' is used in the rule as meaning 'notwithstanding'.

The observations made in *S. A. Venkataraman* v. *The Union of India and another*[1] by Mr. Justice Mukherjea in delivering the judgment of the Court, that:

"Rule 55, which finds a place in the same chapter, lays down the procedure to be followed before passing an order of dismissal, removal or reduction in rank against any member of the service. No such order shall be passed unless the person concerned has been informed, in writing, of the grounds on which it is proposed to take action against him and has been afforded an adequate opportunity of defending himself. An enquiry has to be made regarding his conduct and this may be done either in accordance with the provisions of the Public Servants (Inquiries) Act, 1850, or in a less formal and less public manner as is provided for in the rule itself",

dispel doubt, if there be any, as to the true meaning of the opening clause of the rule.

Does the holding of an enquiry against a public servant under the Public Servants (Inquiries) Act, 1850, violate the equal protection clause of the Constitution?

1. (1954) S.C.R. 1150 : (1954) S.C.J. 461 : (1954) 1 M.L.J. 702.

The appellant submits that the Government is invested with authority to direct an enquiry in one of two alternative modes and by directing an enquiry under the Public Servants (Inquiries) Act which Act it is submitted contains more stringent provisions when against another public servant similarly circumstanced an enquiry under rule 55 may be directed. Article 14 of the Constitution is infringed. The Constitution by Article 311 (2) guarantees to a public servant charged with misdemeanour that he shall not be dismissed, removed or reduced in rank unless he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. The content of that guarantee was explained in *Khem Chand* v. *The Union of India and others*[1]. It was observed that :—

" the reasonable opportunity envisaged by the provision under consideration includes—

(*a*) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based ;

(*b*) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence ; and finally

(*c*) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the Government servant tentatively proposes to inflict one of the three punishments and communicates the same to the Government servant."

By the Constitution, to public servants who are not members of the Indian Civil Service charged with misdemeanour a guarantee to a fair enquiry into their conduct is given, *i.e.*, the public servant must be afforded a reasonable opportunity of defending himself against the charges by demonstrating that the evidence on which the charges are sought to be founded is untrue or unreliable, and also by leading evidence of himself and his witnesses to that end; he must, besides, be afforded an opportunity of showing cause against the proposed punishment. The Constitution however does not guarantee an enquiry directed in exercise of any specific statutory power or administrative rules. But the guarantee in favour of members of the Indian Civil Service is slightly different. By Article 314, a public servant who was appointed by the Secretary of State to a civil service of the Crown in India continues except as expressly provided by the Constitution on or after the commencement of the Constitution to serve under the Government of India or of the State subject to the same conditions of service as respects remuneration, leave and pension and the same rights as respects disciplinary matters or ights as similar thereto as changed circumstances may permit as that person was entitled to immediately before the Constitution. Rule 55 of the Civil Services (Classification, Control and Appeal) Rules before the date of the Constitution assured the public servants that no order of dismissal, or removal from service shall be passed except following upon an enquiry, and by Article 314, to civil servants appointed by the Secretary of State the same rights in disciplinary matters as were available before the Constitution are guaranteed. A member of the Indian Civil Service, before disciplinary action is taken against him is therefore entitled by the force of guarantees enshrined in the Constitution to an enquiry into his alleged misdemeanour either under the Public Servants (Inquiries) Act or under rule 55 of the Civil Services (Classification, Control and Appeal) Rules, in operation at the date of the Constitution. But the guarantee being one of an enquiry directed under one of two alternative powers, the exercise of authority under one of the two alternatives is not *prima facie* illegal.

The procedure to be followed in making an enquiry under the Public Servants (Inquiries) Act, 1850, is prescribed in some detail. The Enquiry Commissioner is required to supply to the person accused a copy of the articles of charges and list of the documents and witnesses by which the charges are to be sustained at least three days before the beginning of the enquiry. By section 11, the prosecutor is required to exhibit articles of charges which are read and the person accused is required to plead 'guilty' or 'not guilty' to each of them; then the plea of the person

1. (1958) S.C.J. 497 : (1958) 1 M.L.J. (S.C.) 1080 at 1096-97.
169 : (1958) 1 An.W.R. (S.C.) 169 : (1958) S.C.R.

accused is required to be recorded and if that person refuses, or without reasonable cause neglects to appear to answer the charge either personally or by his counsel or agent, he shall be taken to admit the truth of the articles of charge. By sections 13, 14, 15 and 16, the sequence to be followed in the examination of witnesses is prescribed. Section 18 prescribes the method of maintaining notes of oral evidence. By section 19, after the person accused has made his defence, the prosecutor is given an opportunity to make a general oral reply on the whole case and to exhibit evidence to contradict any evidence exhibited for the defence; but the person accused is not entitled to any adjournment of the proceedings although such new evidence were not included in the list furnished to him. By section 20, power is given to the Enquiry Commissioner to amend the charge. This procedure is evidently prescribed in greater detail than the procedure prescribed by rule 55. Under rule 55, the grounds on which it is proposed to take action against the public servant concerned must be reduced to the form of a definite charge and be communicated to him together with the statement of the allegations on which each charge is based and of any other circumstances on which it is proposed to take into consideration in passing orders on the case. The public servant must be given reasonable time to put in a written statement of his defence and to state whether he desires to be heard in person, and if he desires or if the authority so directs, an oral enquiry must be held. At that enquiry, opportunity is given to the public servant to cross-examine witnesses, to give evidence in person and to examine his own witnesses. The provisions of the Public Servants (Inquiries) Act, 1850, were made more detailed, for the obvious reason that at the time when that Act was enacted, there was no codified law of evidence in force. But the procedure prescribed by Act XXXVII of 1850 and the procedure to be followed under rule 55 are in substance not materially different. Under either form of enquiry, the public servant concerned has to be given notice of the charge against him; he has to be supplied with the materials on which the charge is sought to be sustained and if he so desires, he may demand an oral hearing at which the witnesses for the prosecution and his own witnesses shall be examined.

Counsel for the appellant submitted that the procedure under the Act was more onerous against the public servant concerned in two important respects: (1) under section 11 of Act XXXVII of 1850, if the accused refuses or without reasonable cause neglects to appear to answer the charge, he shall be taken to admit the truth of the articles of charge, whereas there is no similar provision in rule 55; (2) that under section 19 of the Act, even after the evidence for the defence is closed, it is open to the prosecutor to exhibit evidence to contradict evidence exhibited for the defence and the Commissioner is not bound to adjourn the proceeding although the new evidence was not included in the list furnished to the accused whereas there is no similar provision in rule 55. The procedure prescribed by rule 55 is undoubtedly somewhat more elastic, but the provisions similar to those which have been relied upon by counsel for the appellant as discriminatory are also implicit in rule 55. If the public servant concerned does not desire an oral enquiry to be held, there is no obligation upon the authority to hold an enquiry. Again, there is nothing in the rule which prevents the authority from exhibiting evidence for the prosecution after the case of the defence is closed if that evidence is intended to contradict the evidence of the public servant concerned.

The primary constitutional guarantee, a member of the Indian Civil Service is entitled to is one of being afforded a reasonable opportunity of the content set out earlier, in an enquiry in exercise of powers conferred by either the Public Servants (Inquiries) Act or rule 55 of the Civil Services (Classification, Control and Appeal) Rules and discrimination is not practised merely because resort is had to one of two alternative sources of authority, unless it is shown that the procedure adopted operated to the prejudice of the public servant concerned. In the case before us, the enquiry held against the appellant is not in manner different from the manner in which an enquiry may be held consistently with the procedure prescribed by rule 55, and therefore on a plea of inequality before the law, the enquiry held by the

Enquiry Commissioner is not liable to be declared void because it was held in a manner though permissible in law, not in the manner, the appellant says, it might have been held.

The plea that the Enquiry Commissioner held the enquiry in a manner violative of the rules of natural justice, may now be considered. The appellant examined at the enquiry 82 witnesses and he produced a considerable body of documentary evidence. The High Court held that the Enquiry Commissioner dealt with each charge exhaustively and the enquiry was held in a manner just and thorough. According to the learned Judges of the High Court, on all the applications submitted by the appellant, orders were passed by the Enquiry Commissioner and in a majority of the orders detailed reasons for refusing to accede to the request of the appellant were given. They also held that the appellant had no inherent right to require the Commissioner to summon every witness cited and failure to summon the witnesses could not by itself be regarded reasonably as a ground on which the procedure could be challenged as contrary to the rules of natural justice.

In his petition before the High Court, in para. 7 it was suggested by the appellant that his written request to the Enquiry Commissioner to hold the enquiry at Delhi or Simla, but not at Dharamsala where the appellant had a reasonable apprehension that the witnesses will be 'freely suborned and interfered with was summarily rejected'; but admittedly, all the witnesses of the appellant were examined at Simla and not at Dharamsala.

In paras. 8, 9, and 10 of his petition he submitted that even though he had brought to the notice of the Enquiry Commissioner that there was a conspiracy among certain high functionaries of the Government and certain influential politicians against him, the Enquiry Commissioner declined to permit the evidence about the alleged conspiracy to be brought on the record and observed that he will not give any definite finding against any functionary or high officer of the Government and on this account the enquiry was vitiated. Before us, this contention was not pressed. By para. 10 of his petition, the appellant, stated that even those documents which the appellant desired to be called for to rebut the specific charges were not ordered to be called for by the Enquiry Commissioner and he merely directed that if the appellant possessed any copies of such documents, he may file them in the Court and that those documents will be treated as legal substitute for the original documents. The appellant submitted that this extraordinary procedure resulted in the exclusion of the admissions of the high functionaries of the Punjab Government to the effect that the charges framed against the appellant directly arose out of a conspiracy carried out against the appellant. Neither of these grounds was sought to be pressed before us. In para. 11, the appellant stated that the proceedings taken and the charges framed against him were *mala fide* and the result of a conspiracy, that the Enquiry Commissioner excluded other evidence, documentary and oral, which was sought to be produced to show that the specific charges as framed against him were the result of acts of conspiracy, that the Enquiry Commissioner insisted on a discriminatory procedure requiring the appellant to state in advance in case of each item of evidence or witness, as to what the document contained or the witness had to state before he would agree to summon or record the defence evidence while this procedure was not adopted in the case of the prosecution. Before this Court, the plea of *mala fides* or that discrimination was made between the facilities given to the prosecutor and the appellant was not adverted to. But reliance was sought to be placed upon the ground that the appellant was not permitted an opportunity to examine the witnesses whom he desired to examine and to produce certain documentary evidence, and that on some of the applications which had been submitted by the appellant, the Enquiry Commissioner had not passed any orders. Our attention was invited to certain applications which were filed on or after December 28, 1950. As already observed, on December 28, 1950, the last witness for the appellant was examined. His counsel then submitted an application dated December 28, 1950, praying that documents and files which had been admitted by the parties as part of the record of the case be formally exhi-

bited for facility of reference. This indicates that the appellant had nor more evidence to lead after December, 28, 1950. It is not clear on the record whether any express order was passed on this application ; but assuming that there was no such direction given for exhibiting the documents, we fail to appreciate how the procedure followed operated to the prejudice of the appellant. On December 29, 1950, the appellant applied that the Advocate-General appearing for the prosecution be directed to give 'final and complete answers' to certain queries and to produce relevant documents in support of his answers, and as many as seven questions were set out. It appears, from the application, dated December 30, 1950, filed by the appellant that the Enquiry Commissioner asked the appellant to remodel the questions and accordingly a fresh application with questions re-modelled was submitted. On that application, the Commissioner ordered that he had no objection to allow the appellant to give evidence as to some incident about ' Fauji Mela ' even though there was no reference to that matter at any earlier stage. He, however, declined to allow any further evidence to be called and observed that he had not given to the Prosecutor any special privilege, and that it was not the case of the Prosecutor that there existed express instructions to District Officers in the management of trust funds. The appellant also submitted another application, dated December 30, 1950, praying that the Prosecutor may be asked to reply to the questions set out therein and to produce documents in support of his answers. The Enquiry Commissioner ordered that answers to the questions may be given on affidavits obviating thereby the necessity of considering the prayer for further evidence, and he called upon the Prosecutor to file answers within one month. In the meanwhile, on December 29, 1950, the appellant had submitted an affidavit in which he had set out what happened at a meeting between the Governor of East Punjab, the Chief Secretary and the Deputy Commissioners of various districts and the Superintendents of Police, and made certain submissions with regard to the record which had been produced. On Decemb r 31, 1950, referring to the order passed by the Commissioner giving the appellant an opportunity to give evidence regarding the 'Fauji Mela' the latter requested the Commissioner to direct the Prosecutor to file an affidavit on certain facts stated in the application with a view to enable him to take further necessary steps to establish his contentions in the ma.ter. On that application, the Enquiry Commissioner ordered that the Prosecutor was unable to make statements and in the circumstances of the case he could not accept that further enquiries be allowed. On January 2, 1951, the appellant produced a post card alleged to have been received by him and which he contended had a bearing on his evidence in the enquiry and prayed that if the Enquiry Commissioner had no objection, 'the writer of the enclosure be heard as defence witness before the defence was closed.' But it does not appear that any attempt was made to summon the writer, Suraj Parkash Bakhshi or to keep him present before the Enquiry Commissioner. When the Enquiry Commissioner resumed his enquiry after th winter vacation, on March 12, 1951, the appellant's counsel ubmitted a narrative regarding the alleged victimisation of certain witnesses. The Enquiry Commissioner ordered thereon that he could not enter upon an enquiry as to the alleged victimisation of the witnesses. On March 12, 1951, the appellant submitted another application requesting that immediate steps be taken to examine one Tikka Nardev Chand of Guler in the "light of certain extra-judicial statements" mad by him and also the clerk of the Court of Wards of the Deputy Commissioner's Office may be summoned with necessary papers and files to show as to when the property of the Raja of Guler was taken possession by the Deputy Commissioner and when the allowances of th Raja of Guler and his other dependants were fixed. The Enquiry Commissioner observed that the application was belated and that although he was away from Simla, he was accessible by post and his whereabouts were ascertainable and that he could not allow further evidence of that nature to go on the record. At the instance of the Prosecutor, th Enquiry Commissioner allowed two witnesses, S. Gurbachan Singh and Ch. Mangal Singh to formally prove the statements made by two witnesses, Bishan Das Gupta and Shahbaz Singh who it was claimed had made in the course of the enquiry statements on oath inconsistent with the statements made in the course of the

investigation. Pursuant to the order of the Enquiry Commissioner dated December 30, 1950, the Prosecutor filed certain answers on March 13, 1951, to the questions which were ordered by the Enquiry Commissioner to answer.

The appellant's counsel has conceded that the entire record of the Enquiry Commissioner is not before us. Both the learned Judges of the High Court have held that on every application submitted by the appellant, the Enquiry Commissioner had passed his orders and in a large majority of the orders, detailed reasons were given. We are in this case not concerned to adjudicate upon the correctness of the orders passed by the Enquiry Commissioner on those applications. We are only concerned to decide whether the proceedings were conducted in a manner violative of the rules of natural justice. In the petition before the High Court, beyond a vague ref rence in para. 11 that evidence wsas excluded and documentary and oral evidence to show that the specific charges framed against him were the result of a conspiracy "was not allowed to go in ", no particulars were furnished. In the circumstances, we are unable to hold that the proceedings were conducted in a manner violative of the rules of natural justice. The appellant has not set out in detail in his petition before the High Court specific instances in which evidence was sought to be given, explaining how the evidence was relevant and how the appellant was prejudiced by the evidence being shut out. In the absence of any express pleading and adequate material to support the plea, we are unable to disagree with the view of the High Court that the enquiry was not vitiated on account of violation of the rules of natural justice.

The President of India was not bound before passing an order dismissing the appellant, to hear the evidence of witnesses. He could arrive at his conclusion on the evidence already recorded, in the enquiry by the Enquiry Commissioner. By Article 311 of the Constitution, a public servant is entitled to show cause against the action proposed to be taken in regard to him, but exercise of the authority to pass an order to the prejudice of a public servant is not conditioned by the holding of an enquiry at which evidence of witnesses *viva voce*, notwithstanding an earlier fair and full enquiry before the Enquiry Commissioner, is recorded. In *The High Commissioner for India and another* v. *I.M. Lal*[1], dealing with section 240, clause 3, Lord Thankerton in dealing with similar contentions observed :

" In the opinion of their Lordships, no action is proposed within the meaning of the sub-section until a definite conclusion has been come to on the charges and the acutal punishment to follow is provisionally determined on. Prior to that stage, the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the statute gives the civil servant the opportunity for which sub-section (3) makes provision. Their Lordships would only add that they see no difficulty in the statutory opportunity being reasonably afforded at more than one stage. If the civil servant has been through an inquiry under rule 55, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out ; but that would not exhaust his statutory right, and he would still be entitled to reprssent against the punishment proposed as the result of the findings of the inquiry."

And this view was affirmed by this Court in *Khem Chand* v. *The Union of India and others*[2], where at page 1099, it was observed by Chief Justice S. R. Das :

"Of course if the Government servant has been through the enquiry under rule 55 it would not be reasonable that he should ask for a repetition of that stage, if duly carried out."

By the Constitution, an opportunity of showing cause against the action proposed to be taken against the public servant is guaranteed and that oppotunity must be a reasonable opportunity. Whether opportunity afforded to a public servant in a particular case is reasonable must depend upon the circumstances of that case. The enquiry in this case was held by the Enquiry Commissioner who occupied the High office of Chief Justice of the East Punjab High Court. The appellant himself examined 82 witnesses and produced a large body of documentary evidence and submitted an argumentative defence which covers 321 printed pages. An opportunity of making an oral representation not being in our view a necessary postulate of an

1. (1948) F.C.R. 44 : (1948) 2 M.L.J. 55 : L.R. 75 I.A. 225 (P.C.).
2. (1958) S.C.J. 497 : (1958) 1 M.L.J. (S.C.) 169 : (1958) 1 An. W.R. (S.C.) 169 : 1958 S.C.R. 1080 at 1096-97.

opportunity of showing cause within the meaning of Article 311 of the Constitution, the plea that the appellant was deprived of the constitutional protection of that Article because he was not given an oral hearing by the President cannot be sustained.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

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[END OF VOLUME (1960) I M.L.J. (SUPREME COURT.)].